

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
DTV Consumer Education Initiative	)	MB Docket No. 07-148
	)	
	)	

## REPORT AND ORDER

**Adopted: February 19, 2008**  
**2008**

**Released: March 3,**

By the Commission: Chairman Martin issuing a statement; Commissioner Tate issuing a separate statement; Commissioner Copps concurring and issuing a separate statement; Commissioner McDowell approving in part, concurring in part and issuing a statement; and Commissioner Adelstein approving in part, dissenting in part and issuing a statement.

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## I. INTRODUCTION

1. In this Report and Order, we adopt several proposals relating to consumer education about the digital television (“DTV”) transition. As the Nation’s full-power television stations transition from analog broadcast television service to digital broadcast television service, the Commission has been committed to working with representatives from industry, public interest groups, and Congress to make the significant benefits of digital broadcasting available to the public. The digital transition will make valuable spectrum available for both public safety uses and expanded wireless competition and innovation. It will also provide consumers with better quality television picture and sound, and make new services available through multicasting. These innovations, however, are dependent upon widespread consumer understanding of the benefits and mechanics of the transition. The Congressional decision to establish a hard deadline of February 17, 2009, for the end of full-power analog broadcasting has made consumer awareness even more critical.<sup>1</sup>

2. As explained in more detail below, we thus impose the following requirements in this Order. First, broadcasters must provide on-air information to their viewers about the DTV transition, by compliance with one of three alternative sets of rules, and must report those efforts to the Commission and the public. Second, multichannel video programming distributors (“MVPDs”) must provide monthly notices about the DTV transition in their customer billing statements.

<sup>1</sup> Deficit Reduction Act of 2005, Pub. L. No. 109-171, Title III, §§ 3002(a), 3003, 3004, 120 Stat. 21, 22 (“A full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond February 17, 2009.”). *See also* 47 U.S.C. § 337(e) and 47 U.S.C. § 309(j)(14).

Third, manufacturers of television receivers and related devices must provide notice to consumers of the transition's impact on that equipment. Fourth, DTV.gov Partners must provide the Commission with regular updates on their consumer education efforts. Fifth, companies participating in the Low Income Federal Universal Service Program must provide notice of the transition to their low income customers and potential customers. Sixth, the winners of the 700 MHz spectrum auction must report their consumer education efforts. Finally, we offer our assistance to the National Telecommunications and Information Agency ("NTIA") in policing and enforcing the requirements of the digital converter box retail program. We find that these requirements are necessary to ensure that the American public is adequately prepared for the full-power digital transition, but that they will no longer be necessary after the full-power transition is fully complete. This Order therefore provides that these requirements will be in place for a limited time only.

## II. BACKGROUND

3. Congress has mandated that after February 17, 2009, full-power broadcast stations must transmit only in digital signals, and may no longer transmit analog signals.<sup>2</sup> As the National Consumers League describes it, "[t]he transition to DTV is probably the most significant event for television-viewers since the invention of television itself. It is crucial for people to be aware of the change, understand its impact, and be able to make sound choices."<sup>3</sup> We agree, and the Commission has been actively engaged in DTV consumer education and outreach efforts since before the establishment of the hard full-power transition deadline. Our longstanding and ongoing efforts include a wide range of activities, both completed and planned.<sup>4</sup> For instance, the Chairman recently announced the creation of a DTV Task Force, formalizing the relationships among the numerous

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<sup>2</sup> See Digital Television and Public Safety Act of 2005 ("DTV Act"), which is Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006) ("DRA") (*codified at* 47 U.S.C. §§ 309(j)(14) and 337(e)). DTV Act § 3002(a) amends Section 309(j)(14) of the Communications Act to establish February 17, 2009, as a new hard deadline for the end of analog transmissions by full-power stations. 47 U.S.C. § 309(j)(14)(A). DTV Act § 3002(b) directs the Commission to "take such actions as are necessary (1) to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by February 18, 2009; and (2) to require by February 18, 2009, ... all broadcasting by full-power stations in the digital television service, occur only on channels between channels 2 and 36, inclusive, or 38 and 51, inclusive (between frequencies 54 and 698 megahertz, inclusive)." 47 U.S.C. § 309 Note. DTV Act § 3005(a) also created a coupon program to subsidize the purchase of digital-to-analog ("D-to-A") converter boxes. *Id.*

<sup>3</sup> Comments of National Consumers League at 1.

<sup>4</sup> See *generally*, Letter from the Honorable Kevin J. Martin, Chairman, Federal Communications Commission, to the Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce, and the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, sent June 18, 2007 ("Martin Response") attached as Appendix E.

Offices and Bureaus involved in the transition. The goal of the Task Force is to facilitate a smooth transition that minimizes the burdens on consumers while maximizing their opportunities to benefit from it. As an extension of existing coordination efforts, the Task Force will: meet regularly to discuss and direct ongoing DTV transition efforts, coordinate with other federal agencies, shares ideas, and address any problems that arise or appear imminent. The members of the Task Force will also meet regularly with various stakeholders from industry and federal, state, local, and tribal governments.

4. Representatives John D. Dingell, Chairman of the Committee on Energy and Commerce, and Edward J. Markey, Chairman of the Subcommittee on Telecommunications and the Internet, recently wrote to the Commission to express interest in the pace and scope of consumer education about the full-power transition.<sup>5</sup> As the Congressmen observed, “the Commission is particularly well suited to lead this effort given its existing expertise and resources.”<sup>6</sup> They proposed a number of specific actions that they believe the Commission should take. As discussed above, many of these recommendations are already being actively pursued by the Commission. The Commission released a Notice of Proposed Rulemaking on July 21, 2007,<sup>7</sup> requesting comment on the best means of creating a coordinated, national DTV consumer education campaign. Comments were due September 17, 2007, and reply comments were due October 1, 2007. We reviewed over 30 comments, 6 reply comments, and over 100 ex parte presentations and comments from a wide range of sources, including individuals, trade associations, broadcasters, and nonprofits.

### III. DISCUSSION

5. Insofar as the actions referenced in the Letter require regulatory action by the Commission, we adopt those proposals. As a general matter, it suggests that “the Commission could use its existing authority to compel industry to contribute time and resources to a coordinated, national consumer education campaign.”<sup>8</sup> We agree that the Commission should take whatever steps we can to

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<sup>5</sup> Letter from the Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce, and the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, to the Honorable Kevin J. Martin, Chairman, the Honorable Michael J. Copps, Commissioner, the Honorable Jonathan S. Adelstein, Commissioner, the Honorable Deborah Taylor Tate, Commissioner, and the Honorable Robert M. McDowell, Commissioner, Federal Communications Commission, received May 24, 2007 (“Letter”) attached as Appendix D.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *DTV Consumer Education Initiative*, MB Docket No. 07-148, Notice of Proposed Rulemaking, 22 FCC Rcd 14091 (2007) (“DTV Consumer Education NPRM”).

<sup>8</sup> Letter at 3.

promote a coordinated, national DTV consumer education campaign.<sup>9</sup> Some industry commenters have objected to these requirements on the ground that the Commission has insufficient statutory authority to implement them. These objections are discussed in more detail below. As Telecommunication for the Deaf and Hard of Hearing, *et al.* observe, we have broad authority to require educational outreach efforts concerning the DTV transition.<sup>10</sup> The Commission is statutorily required to promote the orderly transition of full-power stations from analog to digital television,<sup>11</sup> and we have exercised that mandate to, among other things, prevent the continued importation and interstate shipment of analog-only sets and to require retailers to label those analog-only sets they continue to legally sell.<sup>12</sup> Our statutory authority<sup>13</sup> allows us to facilitate the transition by adopting rules requiring the dissemination of essential information about the transition.<sup>14</sup>

6. There is a clear and compelling need for educational efforts directed toward consumers. As Association of Public Television Stations (“APTS”) found in its most recent quarterly consumer survey on the DTV transition, a majority of Americans do not fully understand the transition.<sup>15</sup> Moreover, as the Commission’s Consumer Advisory Committee (“CAC”) points out, a substantial number of Americans have not yet made the switch to digital. By the end of 2007, it was expected that only one-third of households would have a digital television.<sup>16</sup> Of

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<sup>9</sup> As summarized in ¶ 2, *supra*.

<sup>10</sup> Comments of Telecommunication for the Deaf and Hard of Hearing (TDHH) at 8-9.

<sup>11</sup> *See supra* note 2. *See also, e.g.*, 47 U.S.C. §§ 336 note (requiring the Commission to assign paired digital television channels “to further promote the orderly transition to digital television”), 336(b) (expressing Congressional interest in the transition from analog to digital television and reading, in pertinent part, “[i]n prescribing the regulations required by subsection (a), the Commission shall ... (5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.”)

<sup>12</sup> *In the Matter of Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Second Report and Order and Second Memorandum Opinion and Order, 17 FCC Rcd 15978 (2002), (“DTV Tuner Order”) (addressing DTV receiver standards and labeling requirements); *In the Matter of Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*; Second Report and Order, 22 FCC Rcd. 8776 (2007) (“Labeling Order”).

<sup>13</sup> *See* Paragraphs 19-23, 28-29, 39-43, 47, 53-56.

<sup>14</sup> *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (Commission’s authority under its general subject matter jurisdictional grant extends to matters “reasonably ancillary to the effective performance of the Commission’s various responsibilities”) (“*Southwestern Cable*”).

<sup>15</sup> APTS “Over-the-Air Households Prefer Free Broadcast Television After DTV Transition” available at <http://www.apt.org/news/OTA-Study-January-08.cfm> (viewed Feb. 12, 2008).

<sup>16</sup> Comments of the Federal Communication Commission’s Consumer Advisory Committee at 7 (citing Arnold, Thomas K. “DEG: 52 mil HDTV homes in U.S. by ‘08.” *The Hollywood Reporter*. July 18, 2007.). *But see*, Comments of CEA at 3 (prediction that, by the end of 2007, over half will have digital TVs).

households that rely on over-the-air (“OTA”) broadcasts, only seven percent own a digital television.<sup>17</sup> Furthermore, the households that principally rely on OTA broadcasts are the most vulnerable and arguably the most difficult to reach; almost half have annual incomes of less than \$30,000, and two-thirds are headed by someone over 50 years of age or someone for whom English is a second language.<sup>18</sup> Thus, we must take immediate and effective action to ensure that viewers are informed of the effect that the full-power digital transition will have on them and the options that are available to them to make the transition to digital television without losing full-power television service. This Order focuses on actions that television broadcasters, MVPDs, telecommunications carriers, retailers, and manufacturers must take to inform consumers about the transition. Nonetheless, because of the national importance of this issue, we also strongly encourage radio broadcasters to engage in efforts to educate and inform their listeners. Such efforts could be an important complement to consumer outreach by other public and private sector groups between now and the transition.

**A. Broadcaster Education and Reporting**

7. The National Association of Broadcasters (“NAB”) and other broadcast industry commenters have argued that there is a public interest benefit in preserving some flexibility on the part of broadcasters to serve the needs of viewers in their widely divergent communities, and we agree.<sup>19</sup> We therefore adopt rules that give both commercial and noncommercial broadcasters a choice of education and reporting requirements.<sup>20</sup> Furthermore, we acknowledge that the ongoing educational efforts of industry have made a notable impact on consumer awareness, and anticipate continuing effective and creative measures from the industry to increase viewer awareness of the full-power digital transition.<sup>21</sup> As discussed throughout this *Order*, we find a broad-based consumer education mandate essential given the importance of consumer awareness to the digital transition, but we will allow broadcasters the flexibility to choose which of these different plans to follow.

8. Although the sets of requirements are distinct, we find that they each entail a similar level of commitment and engagement on the part of broadcasters. Where the first option calls for more frequent PSAs, the second calls for longer ones, and the third for the same total amount of education with less restriction on length.

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<sup>17</sup> Comments of CAC at 11.

<sup>18</sup> *Id.* at 10 (*citing* Statement of Mark L. Goldstein, United States Government Accountability Office, Testimony Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives, at 7 (Feb. 17, 2005)).

<sup>19</sup> Comments of SBA at 7; Comments of NAB at 10-11.

<sup>20</sup> NAB Ex Parte of February 11, 2008; APTS Ex Parte of February 11, 2008.

<sup>21</sup> NAB Ex Parte of January 31, 2008 (showing very high awareness of the transition).

Where the first and third options allow for PSAs in specified parts of the day, the second option requires greater focus on the hours when most viewers tune in. Where the first option does not require any long educational messaging, the second and third mandate a 30 minute program dedicated to in-depth education. Where Option One requires a set number of crawls, Option Two allows broadcasters to use a variety of in-program messaging techniques to inform viewers, and Option Three requires only PSAs and longer messages. While Options One and Three do not directly address special additional education measures during the final months of the full-power transition, Option Two is more comprehensive in its focus on alternative approaches. All plans require quarterly reporting of both mandatory and voluntary outreach and education efforts. This will allow the Commission not only to monitor compliance, but also to stay informed of the creative approaches being taken by disparate broadcasters all over the country, and continue to serve in its role as the primary transition educator and coordinator of transition education efforts.

9. The Commission's education requirement will go into effect upon the effective date of the rules. Every full-power commercial broadcaster must participate in option One or Two, and noncommercial broadcasters must participate in option One, Two, or Three. Whichever Option is elected, every broadcaster must conduct consumer outreach and education pursuant to that set of rules. Under each of the options, broadcasters must report on its educational and outreach activities by filing Form 388 with the Commission and placing it in the station's public file. Each broadcaster will elect the option with which it will comply no later than the first reporting deadline under the plans, by noting its chosen plan when it first files Form 388.<sup>22</sup> Failure to comply with either the education or reporting requirements under any Option may result in enforcement action.

## **1. Broadcaster Education Option One**

### **a. Option One Consumer Education Requirements**

10. Broadcasters who opt to comply with this option will be required to regularly air a mix of PSAs and crawls, with increasing frequency as the full-power transition approaches, that explain the various important issues of the full-power transition and explain how viewers can find more information.<sup>23</sup> Specifically, a station must air one transition PSA, and run one transition crawl, in every quarter of every day. This requirement applies separately to a station's analog channel and its primary digital stream. This requirement will increase to two PSAs and crawls

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<sup>22</sup> Appendix C.

<sup>23</sup> A "crawl" is "text that advances very slowly across the bottom or top of the screen." *See In the Matter of Review of the Emergency Alert System*, 20 FCC 18625, 18657 note 222 (Rel. Nov. 10, 2005). *See* note 33, *infra*.

per quarter per day on April 1, 2008, and to three of each on October 1, 2008.<sup>24</sup> For the purposes of these education requirements, each broadcast day can be broken into four quarters; 6:01 am to 12:00 pm, 12:01 pm to 6:00 pm, 6:01 pm to 12:00 am, and 12:01 am to 6:00 am. Stations are required to air PSAs or crawls at various times in any given day part, and we expressly require that at least one PSA and one crawl per day be run during primetime hours.<sup>25</sup> We expect that broadcasters will air these DTV PSAs in addition to, and not in lieu of, PSAs on other issues of importance to their local communities. In addition, we require that the transition PSAs be closed-captioned.<sup>26</sup>

11. These requirements will expire for most broadcasters on March 31, 2009.<sup>27</sup> We will increase these requirements if we find, based on the overall progress of DTV consumer education, that it is necessary to revise the frequency, content or duration of the PSAs or crawls on a station-by-station basis, for a particular region, or for the country as a whole.

12. Crawls must run during programming for no less than 60 consecutive seconds across the bottom or top of the viewing area,<sup>28</sup> and be provided in the same language as a majority of the programming carried by the station. Although we do not dictate the exact content of the crawls, we find that, over the 60 second duration, they must repeat a message that conveys the following information:

- On February 17, 2009, full-power analog broadcasting will end, and analog-only televisions may lose the signal being viewed unless the viewer takes action.

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<sup>24</sup> This requirement is in line with the proposed minimums put forth by AARP, TDHH, and CaptionMax. Comments of AARP at 5; Comments of TDHH at 4; Comments of CaptionMax at 2.

<sup>25</sup> For the purposes of this item, “primetime” is defined as the hours between 8:00 pm and 11:00 pm in the Eastern and Pacific time zones, and between 7:00 pm and 10:00 pm in the Mountain and Central time zones.

<sup>26</sup> We recognize that our rules exempt PSAs that are shorter than ten minutes in duration from the captioning requirements. 47 C.F.R. § 79.1(d)(6). Due to the critical information of these PSAs, however, we expressly require that transition PSAs be closed captioned regardless of their duration, notwithstanding the exemption in 79.1(d)(6).

<sup>27</sup> This DTV education requirement will continue for any station that has requested or been granted an extension to serve less than its full authorized service area after March 31, 2009. Some broadcasters filed comments in the Third DTV Periodic describing circumstances that may prevent them from completing construction to reach their fully authorized service area by February 18, 2009. Any station that does not reach all of its pre-transition viewers on February 18, 2009, will be required to continue its education efforts until its request for extension has been withdrawn or denied, or until a granted extension has expired.

<sup>28</sup> The crawls should not block any closed captioning or emergency information, and any closed captioning or emergency information should not block DTV Transition-related crawls. *Cf.* 47 C.F.R. § 79.2(b)(3) (prohibiting closed captioning from blocking emergency information, and vice versa).



- That viewers can get more information by telephone or online, and how to do so.<sup>29</sup>

The crawl may also, at the broadcaster's discretion, provide other information, such as, for example, contact information for the DTV Transition Coalition.

13. Required PSAs must be at least 15 seconds.<sup>30</sup> Each PSA must provide, at a minimum, the same information as required for crawls, above. We acknowledge the creativity of the private sector, as noted by SBA,<sup>31</sup> and do not mandate the form of PSAs other than to require that, over the course of a broadcaster's education campaign, they give more detail about the following subjects:<sup>32</sup>

- what a viewer needs to do to continue watching the station, whether they are an OTA viewer or receive broadcast signals via their MVPD, and
- where appropriate, specific details about the station's transition: for example, shifts in service area, channel numbering changes, the addition of multicast and/or High Definition channels, timing,<sup>33</sup> etc.

14. Additionally, on-air outreach must contain no misleading or inaccurate statements.<sup>34</sup> We do not limit stations to these efforts. For example, certain stations may find that additional PSAs in languages other than those in which a majority of their programming is presented would be beneficial to their viewers; for other stations, multilingual announcements may not be needed.<sup>35</sup> Stations are free to use PSAs provided by outside sources such as NAB or networks, so long as their overall campaign touches on all the elements relevant to their particular transition.

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<sup>29</sup> For example, viewers could be given the option of calling the station at a number provided or going to [www.DTV.gov](http://www.DTV.gov), and/or could be directed that they can get more information about the converter box program by going to [www.dtv2009.gov](http://www.dtv2009.gov) or calling the NTIA at 1-888-DTV-2009.

<sup>30</sup> Broadcasters are free to air additional PSAs that do not meet all these requirements, as long as the information included is accurate and not misleading.

<sup>31</sup> Comments of SBA at 7. *See also* the National Association of Broadcaster's request for flexibility. Comments of NAB at 10-11.

<sup>32</sup> Comments of Benton at 12 (urged PSAs to include information about the transition, benefits, options for consumers and set top box demonstrations); Comments of National Hispanic Media Coalition at 6 (detailing a schedule for progressively more detailed PSA information segments as the transition date nears); Comments of COAT at 8 (supporting a requirement that PSAs explain 'key elements' of the transition); Comments of Entravision at 4-5 (suggests airing PSAs during all dayparts, suggests particular content and information about boxes and coupon program).

<sup>33</sup> *See* note 27, *supra*.

<sup>34</sup> *See* 47 C.F.R. § 73.674(c)(3)(vi) in Appendix B, Amended Rules, and Section A in Appendix C, Broadcaster Reporting Form.

<sup>35</sup> *See, e.g.*, Reply of COAT at 9 and Comments of Lincoln Broadcasting at 2.

The flexibility of the rules we adopt today makes clear that we are focusing on Congress's command to promote an orderly full-power transition.<sup>36</sup>

15. The Letter suggested that the Commission consider using its regulatory authority to "require television broadcasters to air periodic public service announcements and a rolling scroll about the digital transition."<sup>37</sup> We have adopted this requirement, while giving broadcasters significant latitude to determine the best way to present the essential information on the timing and nature of the full-power transition and how to continue receiving the station's programming throughout and after the transition.<sup>38</sup>

16. Most of the commenters who commented on this issue agreed with the Commission that broadcast consumer education efforts are the best way to reach viewers who will be most affected by the full-power transition, particularly those who rely primarily or exclusively on OTA television.<sup>39</sup> For example, one commenter states that PSAs should be the "*primary* focus for transition education efforts," and that an education program including PSAs must be mandated to ensure public education "in a timely manner."<sup>40</sup> It is also important not to simply rely on one form of on-screen education or the other. Crawls and PSAs convey information very differently, and reach different groups of people as a result. Given the growing use of personal video recorders and other devices that can be used for time-shifting and commercial skipping, many consumers might not be reached by education efforts, such as PSAs, that air only during programming breaks. At the same time, a crawl can not reach those viewers whose eyesight is not strong enough to read its comparatively small print, or who are not able to read at all. Using both methods will ensure that education efforts reach more viewers. Broadcaster commenters are

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<sup>36</sup> 47 U.S.C. § 336 note.

<sup>37</sup> Letter at 3. We note that although the Letter refers to "scrolls," commenters (including AARP, NAB, and APTS) understood this to refer to what in the closed captioning context we have called a "crawl." Indeed, the National Hispanic Media Coalition, which strongly supports PSA requirements and calls for "Y2K-level consumer education efforts," opposes vertical scrolls as unnecessary. Comments of NHMC at 3. For the sake of consistency and to reflect the generally understood intent of the proposal, we use the term "crawl" here. *See also* note 23, *supra*.

<sup>38</sup> This might be different because some stations have requested, in the Third DTV Periodic (MB Docket No. 07-91), that they be permitted to reduce or end their analog service on dates other than February 17, 2009. *See, e.g.*, Comments of Bahakel at 3 (early transition); Reply of APTS at 4 (early and late transition); Reply of NAB and MSTV at 5 (early transition); Reply of MSTV and NAB reply at 11 (late transition); Comments of The Association of Federal Communications Consulting Engineers at 6 (late transition); Comments of Red River Broadcast Co., LLC 4-5. *See also* Reply of Chris Llana at 2 (supporting these requests).

<sup>39</sup> National Hispanic Media Coalition at 1-2; Telecommunications Regulatory Board of Puerto Rico at 4; New York State Consumer Protection Board at 1; DTV Consumer Education NPRM at ¶5 (over the air programming is best way to educate consumers).

<sup>40</sup> Reply of Chris Llana at 3.

generally in agreement regarding the importance of their role in consumer education; for instance, Entravision, a Spanish language broadcaster, supports mandatory PSAs.<sup>41</sup> Even those broadcasters who oppose regulation in this matter say that, regardless of our decision here, they plan to engage in consumer outreach and education that “far exceed any requirements the FCC could or should impose,” because “the ability to reach *every household* is the foundation of broadcast television’s public interest and operational success.”<sup>42</sup> A wide array of broadcaster activity is promised not just in this Commission docket, but also in testimony to Congress.<sup>43</sup>

17. Despite commendable pledges by organizations like the State Broadcasters Association (“SBA”) and NAB, we find that regulatory action is the only way to ensure a sustained, nationwide, station-by-station effort. As the Benton Foundation observes,<sup>44</sup> these organizations have no power to bind individual stations. We acknowledge and appreciate the leadership and coordination efforts of NAB, and anticipate continuing to work with it on additional voluntary efforts. At the same time, we are convinced that DTV consumer education needs to be a nationwide station-by-station effort. As SBA says, consumer education is “critical” because interruption of broadcast service to even a single home is “unacceptable.”<sup>45</sup> Our rules will ensure that the critical need for education is met in every market. NAB and APTS both argue that we can simply rely on the interests of all broadcasters in preserving their over-the-air audience, and that we therefore need not require any broadcaster education efforts.<sup>46</sup> While we agree that broadcasters have every incentive to prepare their viewers for the transition, a “baseline requirement” is necessary to ensure the public awareness necessary for a smooth and orderly transition. We have adopted NAB’s proposal as an alternative method by which stations can meet this baseline requirement.<sup>47</sup> As the CAC points out, there will be a number of contrary pressures on local broadcasters over the next 12 months.<sup>48</sup> For example, it is possible that the viewers most likely to be left behind due to an insufficient educational effort are the ones least demographically

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<sup>41</sup> Comments of Entravision at 1.

<sup>42</sup> Comments of the State Broadcasters Association (SBA) at 8, 2 (emphasis in original); *See also* Reply of NAB at 3 (citing SBA’s comments approvingly).

<sup>43</sup> *See generally*, Testimony of Marcellus Alexander, NAB Executive Vice President of Television, before the Committee on Aging, U.S. Senate (September 19, 2007).

<sup>44</sup> Comments of Benton at 11.

<sup>45</sup> Comments of SBA at 2.

<sup>46</sup> Comments of NAB at 11; Comments of APTS at 5.

<sup>47</sup> NAB Ex Parte of February 11, 2008.

<sup>48</sup> Comments of CAC at 16.

attractive to advertisers.<sup>49</sup> Finally, potential advertising revenue from such sources as presidential and other political campaigns may make it tempting, in the short run, not to devote advertising time to transition education.<sup>50</sup>

18. APTS suggests that public television stations be exempt from any requirements because they have a good track record of informing the public and because they are limited in the time they have to air public service announcements.<sup>51</sup> We disagree because the rules we impose are designed to complement efforts such as APTS'; if broadcasters are already engaging in these efforts, the rules will not be a burden. However, as with commercial stations, we have given noncommercial broadcasters the option to comply with our requirements via an alternative route.<sup>52</sup>

19. *Statutory Authority.* NAB, alone among commenters, argues that the Commission does not have statutory authority to require that broadcasters inform their viewers of the full-power broadcast digital television transition.<sup>53</sup> NAB argues that Section 326 of the Act, prohibiting us from interfering with the right of free speech by broadcasters, prevents us from acting here absent a grant of authority that specifically mentions DTV consumer education PSAs and crawls.<sup>54</sup> We disagree. As discussed more fully in Section G, below, our actions here do not constitute an improper restriction on speech.<sup>55</sup> NAB also asserts an artificially narrow conception of the Commission's statutory authority when it argues that we cannot act without a "specific statutory provision authorizing required PSAs and crawls, including content thereof."<sup>56</sup> As noted above, Congress both mandated the digital transition and vested the Commission with the power to "prescribe such regulations as may be necessary for the protection of the public interest, convenience, and necessity" in connection with the digital transition.<sup>57</sup>

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<sup>49</sup> Comments of Benton at 11.

<sup>50</sup> *Id.*

<sup>51</sup> Comments of APTS at 5.

<sup>52</sup> APTS Ex Parte of February 11, 2008.

<sup>53</sup> Comments of NAB at 11-12; Reply of NAB at 5-6.

<sup>54</sup> Comments of NAB at 12.

<sup>55</sup> See Section G, *infra*.

<sup>56</sup> Comments of NAB at 12.

<sup>57</sup> 47 U.S.C. § 303(r); § 336; see also *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *National Broadcasting, Inc. v. United States*, 319 U.S. 190, 218-20 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-8 (1940) (supporting the Commission's authority to interpret the public interest standard on the Communications Act.)

20. Finally, broadcast licensees have a statutory obligation to “serve the public interest, convenience, and necessity.”<sup>58</sup> One can scarcely conceive a situation more illustrative of the “necessity” prong of this duty than the instant case, where certain viewers will cease having access to full-power broadcast services transmitted over the public airwaves on a date certain absent concerted informational efforts. There simply can be no national full-power digital broadcast transition if the very people who rely on broadcast television are unaware of it. As NAB acknowledges, “[t]he future of free-over-the air television depends upon a smooth transition.... For this to happen, the American public must understand what all-digital broadcasting means for them.”<sup>59</sup>

21. Broadcasters must take some responsibility for educating the public that they are bound to serve. If a blizzard hits Chicago on February 18, 2009, all over-the-air viewers should be able to turn on their television and receive emergency information without missing a beat.<sup>60</sup> Educating viewers so that they have access to digital transmissions is a keystone of the transition which the FCC is statutorily required to effectuate, and broadcasters must play a central role in that process. In reviewing other regulations designed to advance the digital transition, the D.C. Circuit held in *Consumer Electronics Ass’n v. FCC*<sup>61</sup> that “[g]iven Congress’ instruction to end analog broadcasts . . . and the Commission’s finding that [current trends were not such that the public would be ready for the transition], . . . the Commission reasonably determined to take action . . . so that the DTV transition may move at the pace required by Congress.”<sup>62</sup> As in *CEA*, we must take action to ensure the orderly transition of broadcast service to digital and we have the statutory authority to do so.

22. Finally, the imposition here is similar to existing requirements for broadcaster station identification and broadcast of license renewal notices.<sup>63</sup> The change from analog to digital broadcasting is at least as fundamental to the operation of a station as the possession of a broadcast license, and of more practical import to viewers. Given the extremely minimal requirements for producing a compliant PSA or crawl and the indispensable role that television stations must play in educating their viewers in how they can continue to have access to full-power television service after the transition, it does not avail NAB to claim that

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<sup>58</sup> 47 U.S.C. §§ 303(r); 336; and 309(k).

<sup>59</sup> Comments of NAB at 2.

<sup>60</sup> See also Comments of Stephen Wong at 1.

<sup>61</sup> *Consumer Electronics Ass’n v. FCC*, 347 F.3d 291 (D.C. Cir. 2003).

<sup>62</sup> *Id.* at 301.

<sup>63</sup> See, e.g., Comments of Benton at 19 (citing 47 C.F.R. §§ 73.1201 and 73.3580).

these public notices are fundamentally different from other broadcast notice requirements because they are “furthering a government policy.”<sup>64</sup>

23. The Commission, in a similar context, enforced broadcaster public interest obligations by requiring digital television stations to participate in the emergency alert system (“EAS”). In that proceeding, NAB agreed with the Commission that participation in EAS was a natural extension of broadcaster public interest obligations.<sup>65</sup> The order noted that exemption from this requirement would not be in the public interest. It also noted that if participation in the Emergency Alert System were voluntary, some communities could be left without an EAS source, and such messages are too important to risk missing “because a person is tuned to the wrong channel.”<sup>66</sup> Similarly, in the case of the transition, an exemption from consumer education is contrary to the public interest because the public has a right to know how televisions will function after February 17, 2009. A voluntary program is inadequate because transition information is too important to risk that some viewers will lack the necessary information because the licensee serving them fails to provide that information in a timely fashion. If viewers see a blank screen on February 18, 2009, because they were not informed about the actions they needed to take to continue receiving television programming, they will effectively be deprived of access to all OTA television service -- including EAS.<sup>67</sup>

#### **b. Option One Reporting Requirements**

24. A broadcaster choosing to comply with Option One will be required to electronically report its consumer education efforts to the Commission on a

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<sup>64</sup> Reply of NAB at 5, note 15.

<sup>65</sup> *Review of the Emergency Alert System*, EB Docket No. 04-296, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 18625, 18633 (2005).

<sup>66</sup> *Id.* at 18634.

<sup>67</sup> The Commission imposed a similar requirement upon broadcasters pursuant to the Children’s Television Act (“CTA”). The First Report and Order in the Children’s Television proceeding required broadcasters to “air three hours per week of core programming...or air a package of programming that demonstrates a level of commitment to educating and informing children that is at least equivalent to airing three hours per week of core programming.” *See generally, In the Matter of Policies and Rules Concerning Children’s Television Programming*, MM Docket No. 93-48, *Revision of Programming Policies for Television Broadcast Stations*, Report and Order, 11 FCC Rcd 10660 (1996). The Commission ordered the regulation because it found that market forces were insufficient to ensure that commercial stations would provide children’s educational and information programming. The Commission concluded that “requiring broadcasters to serve the educational and informational needs of their child audience was clearly within the scope of the long recognized obligation of broadcasters to serve the public interest.” *Id.* In this proceeding, the circumstances are similar. For the purpose of educating the national viewing audience who will not, on their own, inform themselves, the Commission must regulate all broadcasters. As some commenters admit, certain consumer education efforts do not serve their economic interests. *See*, for example, EchoStar at 4 (billing inserts are expensive); APTS at 11 (paperwork associated with government mandates is expensive); US Telecom Association at 1-2 (billing inserts useless and expensive).

quarterly basis, and place these reports in the broadcaster's public file and, if the broadcaster has a public website, on that website. These reports will be made available on the Commission's website in a centralized, searchable database. For each quarter of required consumer education, we require that broadcasters electing Option One complete Form 388 and file it electronically in this docket (07-148) by the tenth day of the succeeding calendar quarter, with a copy placed in the station's public inspection file by that same date. Because of the limited duration of the full-power transition period, only a limited number of these quarterly reports will be required. The first, covering the first quarter of 2008, must be filed no later than April 10, 2008, and the last, covering a station's final quarter of mandated educational efforts, will be filed no later than April 10, 2009, for most stations. Stations that are required to continue educational efforts beyond March 31, 2009, must also continue to file these quarterly reports, up to and including the final quarter in which they have active educational requirements.<sup>68</sup>

25. The Letter suggested that the Commission consider requiring "broadcast licensees and permittees to report, every 90 days, their consumer education efforts, including the time, frequency, and content of public service announcements aired by each station in a market, with civil penalties for noncompliance."<sup>69</sup> It also suggested that the Commission consider imposing "interim requirements for detailing a broadcaster's consumer education efforts in the required local public inspection file, such as by including coverage about the digital transition in the issues/programs list compiled every three months or by making announcements in local newspapers or on-air similar to public notice requirements for new stations or license renewal."<sup>70</sup>

26. Broadcasters generally oppose this reporting requirement.<sup>71</sup> As discussed above, broadcaster education efforts are a central part of consumer education concerning the transition. We require reporting to enforce these consumer education initiatives and ensure that the necessary efforts are underway. As the National Hispanic Media Coalition observes, "[t]here is no satisfactory alternative to this reporting."<sup>72</sup> As with the Children's Television Programming requirements, self-reporting allows broadcasters to verify for themselves that they are fulfilling their obligations.<sup>73</sup> Furthermore, because of the importance of these

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<sup>68</sup> See note 23, *supra*.

<sup>69</sup> Letter at 3.

<sup>70</sup> *Id.*

<sup>71</sup> Comments of SBA at 8; Comments of North Carolina Association of Broadcasters at 1; Comments of APTS at 11. *But see* APTS Ex Parte of February 11, 2008 (proposing a reporting requirement for noncommercial broadcaster's education efforts).

<sup>72</sup> Comments of National Hispanic Media Coalition ("NHMC") at 7.

<sup>73</sup> *Policies and Rules Concerning Children's Television Programming*, MM Docket No. 93-48, Report and Order, 11 FCC Rcd. 10660, ¶68 (1996) ("Children's Television Programming Order").

education requirements and the relatively short time frame of the full-power transition, the Commission needs to be able to monitor compliance with and enforce those obligations in a way that is not prohibitively cost- and time-consuming. Self-reporting is the most effective way to do this.

27. As to the form and format of the reports, the AARP and others take the position that the reports should include detailed information about each airing of a PSA and its content, and should be filed quarterly.<sup>74</sup> The Benton Foundation suggests that the reports be filed in electronic form, and also be placed in the broadcaster's public file.<sup>75</sup> As noted, we decline to require a specific format, but all of the above information must be included.

28. Given our statutory authority to require the PSAs and crawls, as discussed above, we also have authority to require broadcasters to document and report their compliance efforts. We have statutory authority under the Communications Act to require broadcasters to provide information about their programming to the public and the Commission.<sup>76</sup> Providing information to the public about their transition education efforts will make broadcasters more accountable for their public interest obligation to promote the continued availability of free television programming and ensure a smooth transition. Sections 303(r) and 4(i) of the Communications Act provide ample authority for the reporting requirement because providing this information will help us ensure broadcasters are acting as public trustees<sup>77</sup> and the Commission is fulfilling its duty to oversee the full-power transition.<sup>78</sup> In addition, Section 4(k) of the Communications Act expressly authorizes the Commission to collect information and data "as may be considered of value in the determination of questions connected with the regulation of interstate ... radio communication and radio transmission of energy" to assist the Congress in its normal oversight responsibilities.<sup>79</sup> Determining whether the American public is adequately informed and educated about the full-power DTV transition is of significant concern to Congress, and the reporting requirements will assist the Commission in gathering this important information. In addition, these

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<sup>74</sup> Comments of AARP at 7; Comments of the Telecommunications Regulatory Board of Puerto Rico ("PR") at 4; Comments of NHMC at 7.

<sup>75</sup> Comments of Benton at 15-16, 22.

<sup>76</sup> 47 U.S.C. §§ 303(r); 336; *See also United States v. Storer Broadcasting Co.*, 351 U.S. 192, 203 (1956); *National Broadcasting, Inc. v. United States*, 319 U.S. 190, 218-20 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137-8 (1940).

<sup>77</sup> *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 383 (1969).

<sup>78</sup> *See* note 10, *supra*.

<sup>79</sup> *See* 47 U.S.C. § 154(k)(1) (directing the Commission to make an annual report to Congress which "shall contain"... "such information and data collected by the Commission as may be considered of value in the determination of questions connected with the regulation of interstate and foreign wire and radio communication and radio transmission of energy").



reporting requirements are “necessary for the protection of the public interest, convenience, and necessity” in connection with the digital transition because they will assist the Commission in assessing consumer understanding of the transition and in determining whether adjustments to the educational efforts must be made.<sup>80</sup> Further, without broadcasters reporting their efforts, the public and the Commission will be unable to determine at renewal time whether stations have complied with the consumer education rules.<sup>81</sup> Indeed, these requirements are similar to the long-standing issues/programs list requirements which require stations to list every three months their programs that have provided the most significant treatment of community issues and retain these lists in their public file.<sup>82</sup> As with on-air identifiers, our broad authority under the Communications Act to carry out the public interest requirement permits us to have broadcasters provide public service announcements to effectuate the public interest standard. Although we have not previously required broadcasters to air public service announcements, we have required stations to broadcast certain on-air announcements,<sup>83</sup> to give public notice in a local newspaper for certain broadcast applications,<sup>84</sup> and to make available certain information in a public file.<sup>85</sup>

29. Similarly, the Commission’s First Report and Order<sup>86</sup> pursuant to the Children’s Television Act<sup>87</sup> relied on the authority cited above and the Commission’s authority to enforce the public interest obligations of broadcasters<sup>88</sup> to impose upon broadcasters mandatory quarterly<sup>89</sup> children’s programming reporting requirements. Here, the reporting requirement is much more lenient, as it is for a finite period of time.

## **2. Broadcaster Education Option Two**

### **a. Option Two Consumer Education Requirements**

30. We find that the record also supports permitting broadcasters to choose to comply with our rules by following the alternative plan offered by the

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<sup>80</sup> 47 U.S.C. § 336(b)(5).

<sup>81</sup> 47 U.S.C. § 309(k).

<sup>82</sup> See 47 C.F.R. § 73.3526(e)(11).

<sup>83</sup> See 47 C.F.R. §§ 73.1201 (requiring station identification); 73.1212 (requiring sponsorship identification).

<sup>84</sup> See *id.* § 73.3580.

<sup>85</sup> See *id.* §§ 73.3526, 73.3527.

<sup>86</sup> Children’s Television Programming Order, 11 FCC Rcd 10660.

<sup>87</sup> 47 U.S.C. §§ 303(a), (b) and 394.

<sup>88</sup> Children’s Television Programming Order, 11 FCC Rcd at para. 7.

<sup>89</sup> *Id.* at 10663.

National Association of Broadcasters.<sup>90</sup> Under this option, a broadcaster must air an average of sixteen transition PSAs per week, and an average of sixteen transition-related crawls, snipes, and/or tickers<sup>91</sup> per week, over each quarter through the transition period between 5:00 am and 1:00 am. No PSAs or crawls, snipes, and/or tickers aired between the hours of 1:00 am and 5:00 am will qualify as compliant for the purposes of these education requirements. Over the course of each calendar quarter, one fourth of all PSAs and crawls, snipes, and/or tickers must air between 6:00 pm and 11:35 pm, Eastern and Pacific, and between 5:00 pm and 10:35 pm, Central and Mountain. These requirements will expire for most broadcasters on March 31, 2009.<sup>92</sup> This requirement applies separately to a station's analog channel and its primary digital stream. As with broadcasters electing Option One, we expect that broadcasters electing Option Two will air these DTV PSAs in addition to, and not in lieu of, PSAs on other issues of importance to their local communities. And, as under Option One, these transition PSAs must be closed-captioned.<sup>93</sup> Stations are free to use PSAs produced in-house or provided by outside sources such as NAB or the networks.

31. Required PSAs must be at least 30 seconds in length. A broadcaster may, however, choose to air two PSAs of no less than 15 seconds in length in place of a single PSA of at least 30 seconds in length.<sup>94</sup> Stations will also air at least one 30-minute informational program on the digital television transition between 8:00 am – 11:35 pm on at least one day prior to February 17, 2009.

32. Beginning on November 10, 2008, all stations must begin a 100-Day Countdown to the full-power transition. During this period, each station must air at least one of the following per day:

- *Graphic Display.* A graphic super-imposed during programming content that reminds viewers graphically there are “x number of days” until the

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<sup>90</sup> NAB Ex Parte of February 11, 2008.

<sup>91</sup> *Id.*

<sup>92</sup> This DTV education requirement will continue for any station that has requested or been granted an extension to serve less than its full authorized service area after March 31, 2009. Some broadcasters filed comments in the Third DTV Periodic describing circumstances that may prevent them from completing construction to reach their fully authorized service area by February 18, 2009. Any station that does not reach all of its pre-transition viewers on February 18, 2009 will be required to continue its education efforts until their request for extension has been withdrawn or denied, or until a granted extension has expired.

<sup>93</sup> We recognize that our rules exempt PSAs that are shorter than ten minutes in duration from the captioning requirements. 47 C.F.R. § 79.1(d)(6). Due to the critical information of these PSAs, however, we expressly require that transition PSAs be closed captioned regardless of their duration.

<sup>94</sup> Broadcasters are free to air additional PSAs that do not meet all these requirements, as long as the information included is accurate and not misleading.

full-power transition. They will be visually instructed to call a toll-free number and/or visit a Website for details. The length of time will vary from 5 to 15 seconds, at the discretion of the station.

- *Animated Graphic.* A moving or animated graphic that ends up as a countdown reminder. It would remind viewers that there are “x number of days” until the full-power transition. They will be visually instructed to call a toll-free number and/or visit a Website for details. The length of time will vary from 5 to 15 seconds, at the discretion of the station.
- *Graphic and Audio Display.* Option #1 or option #2 with an added audio component. The length of time will vary from 5 to 15 seconds, at the discretion of the station.
- *Longer Form Reminders.* Stations can choose from a variety of longer form options to communicate the countdown message. Examples might include an “Ask the Expert” segment where viewers can call in to a phone bank and ask knowledgeable people their questions about the transition.<sup>95</sup> The length of these segments will vary from 2 minutes to 5 minutes, at the discretion of the station (Some stations may also choose to include during newscasts DTV “experts” who may be asked questions by the anchor or reporter about the impending February 17, 2009, deadline).

#### **b. Option Two Reporting Requirements**

33. We also find that the record supports a requirement that broadcasters electing Option Two electronically report their consumer education efforts to the Commission on a quarterly basis, and place these reports in the broadcaster’s public file, just as under Option One. These reports will be made available on the Commission’s website in a centralized, searchable database. For each quarter of required consumer education, we require that broadcasters electing Option Two complete Form 388 and file it electronically in this docket (07-148) by the tenth day of the succeeding calendar quarter, with a copy placed in the station’s public inspection file by that same date. Because of the short remaining duration of the full-power transition period, only a limited number of these quarterly reports will be required. The first, covering the first quarter of 2008, must be filed no later than April 10, 2008, and the last, covering a station’s final quarter of mandated educational efforts, will be filed no later than April 10, 2009, for most stations. Stations that are required to continue educational efforts beyond March 31, 2009,

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<sup>95</sup> NAB states that “[t]his has been successfully used by medical doctors who are often called on during the flu season, post-traumatic events or other local health related concerns. Adding the “expert” ensures people instinctively know they can rely on the advice and action suggested by the expert.” NAB Ex Parte of February 11, 2008.

must also continue to file these quarterly reports up to and including the final quarter in which they have active educational requirements.<sup>96</sup>

### 3. Broadcaster Education Option Three

#### a. Option Three Consumer Education Requirements

34. This option is open only to noncommercial broadcasters. We find that the record also supports permitting some broadcasters to choose to comply with our rules by following the alternative plan offered by the APTS.<sup>97</sup> Under this option, a broadcaster must air 60 seconds per day of on-air consumer education, in variable timeslots, including at least 7.5 minutes per month between 6:00 pm and 12:00 am. Beginning May 1, 2008, this requirement doubles, and beginning November 1, 2008, it increases again, to 180 seconds per day and 22.5 minutes per month between 6:00 pm and midnight. The transition PSAs must be closed-captioned.<sup>98</sup> These requirements will expire for most broadcasters on March 31, 2009.<sup>99</sup> Stations will also air a 30-minute informational program on the digital television transition between 8:00 am – 11:35 pm on at least one day prior to February 17, 2009. This requirement applies separately to its analog channel and its primary digital stream.<sup>100</sup> As with broadcasters electing Option One, we expect that broadcasters electing Option Three will air these DTV PSAs in addition to, and not in lieu of, PSAs on other issues of importance to their local communities. Stations are free to use PSAs produced in-house or provided by outside sources such as NAB or the networks. And, as under Option One, these transition PSAs must be closed-captioned.<sup>101</sup>

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<sup>96</sup> See note 27, *supra*.

<sup>97</sup> APTS Ex Parte of February 12, 2009.

<sup>98</sup> We recognize that our rules exempt PSAs that are shorter than ten minutes in duration from the captioning requirements. 47 C.F.R. § 79.1(d)(6). Due to the critical information of these PSAs, however, we expressly require that transition PSAs be closed captioned regardless of their duration.

<sup>99</sup> This DTV education requirement will continue for any station that has requested or been granted an extension to serve less than its full authorized service area after March 31, 2009. Some broadcasters filed comments in the Third DTV Periodic describing circumstances that may prevent them from completing construction to reach their fully authorized service area by February 18, 2009. Any station that does not reach all of its pre-transition viewers on February 18, 2009, will be required to continue its education efforts until their request for extension has been withdrawn or denied, or until a granted extension has expired.

<sup>100</sup> *I.e.*, a station must fully comply for its analog channel, and fully comply for its primary digital stream. Compliant transition-related education pieces may air simultaneously on a station's analog channel and its primary digital stream, but are not required to do so.

<sup>101</sup> We recognize that our rules exempt PSAs that are shorter than ten minutes in duration from the captioning requirements. 47 C.F.R. § 79.1(d)(6). Due to the critical information of these PSAs, however, we expressly require that transition PSAs be closed captioned regardless of their duration.

### b. Option Three Reporting Requirements

35. We also find that the record supports a requirement that noncommercial broadcasters electing Option Three electronically report their consumer education efforts to the Commission on a quarterly basis, and place these reports in the broadcaster's public file, just as under Option One. These reports will be made available on the Commission's website in a centralized, searchable database. For each quarter of required consumer education, we require that broadcasters electing Option Three complete Form 388 and file it electronically in this docket (07-148) by the tenth day of the succeeding calendar quarter, with a copy placed in the station's public inspection file by that same date. Because of the short remaining duration of the full-power transition period, only a limited number of these quarterly reports will be required. The first, covering the first quarter of 2008, must be filed no later than April 10, 2008, and the last, covering a station's final quarter of mandated educational efforts, will be filed no later than April 10, 2009, for most stations. Stations that are required to continue educational efforts beyond March 31, 2009, must also continue to file these quarterly reports up to and including the final quarter in which they have active educational requirements.<sup>102</sup>

### 4. Low-Power, Class A, and Translator Stations

36. Low-power ("LP") broadcast stations are not required to cease broadcasting in analog as of February 17, 2009. Although some already have or plan to independently transition to digital-only broadcasting, many of these stations will continue to broadcast in analog after the conclusion of the full-power transition. Thus, many consumers may receive some programming in digital and some programming in analog after the transition date. Those consumers with analog televisions who are reliant on over-the-air broadcasting will need to acquire a digital to analog converter box to continue watching television after the transition. Recently, concerns have been raised, by the Community Broadcasters Association among others,<sup>103</sup> about the fact that the majority of Coupon Eligible Converter Boxes ("CECBs") certified by NTIA are not capable of "passing through" analog signals from the antenna to a connected set.<sup>104</sup> As a result, LP stations (including Class A and translator stations) that continue to broadcast in analog will not be viewable to OTA viewers who rely on a converter box, unless they use one of the boxes with pass-through capability.

37. This issue was raised before the Commission after the record in this rulemaking had closed, and we therefore do not have a record on it. Accordingly, we have an insufficient basis upon which to adopt consumer education

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<sup>102</sup> See note 27, *supra*.

<sup>103</sup> Petition of CBA

<sup>104</sup> As of February 20, 2009, four of approximately forty certified boxes have pass-through capability.

requirements relating to this issue in the instant proceeding.<sup>105</sup> Nonetheless, given that converter boxes are already on the shelves of many retailers, and coupons are in the process of being mailed to consumers, we recognize the urgency of the problem for those consumers who may have difficulty viewing these low power stations. We therefore urge all LP broadcasters, but particularly those that plan to continue analog-only broadcasting, to immediately begin educating their viewers about this issue. For instance, such stations could notify their viewers that: (1) they are watching a low-power broadcast station that, unlike full-power stations, may continue to offer analog service after February 17, 2009, and (2) viewers who plan to purchase a converter box in order to view digital signals should buy a model with analog pass-through capability in order to continue watching that station. The LP station could direct viewers to the NTIA converter box coupon program, and in particular the NTIA listing of certified converter boxes.<sup>106</sup> We also urge industry and our private and public sector partners to do what they can to educate consumers generally about this situation, and to assist in the effort to ensure that no American loses a signal due to the transition.

#### **B. Multichannel Video Programming Distributor Customer Bill Notices**

38. We will require that all MVPDs (*e.g.*, DBS carriers, cable operators, open video system operators, private cable operators, etc.) provide notice of the full-power DTV transition to their subscribers in monthly bills or billing notices.<sup>107</sup> The notice must be provided as a “bill stuffer” or as part of an information section on the bill itself. It must be noticeable, and state that on February 17, 2009, full-power analog broadcasting will end, and analog-only televisions may be unable to display full-power broadcast programming unless the viewer takes action. It must also note that viewers can get more information by going to [www.DTV.gov](http://www.DTV.gov) or calling the MVPD at a number provided, and more information about the converter box program by going to [www.dtv2009.gov](http://www.dtv2009.gov) or calling the NTIA at 1-888-DTV-2009. The notice may also, at the MVPD’s discretion, provide contact information for the DTV Transition Coalition. The message should be provided in the same language or languages as the bill, and explain clearly what impact, if any, the transition will

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<sup>105</sup> The Commission intends to issue a Notice of Proposed Rulemaking on potential consumer education requirements for low power television stations as part of an upcoming proceeding.

<sup>106</sup> A current list of coupon-eligible converter boxes is available at [https://www.ntiadtvtv.gov/cecb\\_list.cfm](https://www.ntiadtvtv.gov/cecb_list.cfm). The converter box models that have analog pass-through capability are noted on the list with an asterisk next to them. In addition, NTIA will mail a list of current coupon-eligible converter boxes, noting with an asterisk those that have analog pass-through capability, to each household that receives converter box coupons. Viewers can also check with their retailer to determine whether a particular converter box has analog pass-through capability.

<sup>107</sup> To the extent that a given customer does not receive paper versions of either a bill or a notice of billing, that customer must be provided with equivalent monthly transition notices in whatever medium they receive information about their monthly bill.

have on the subscriber's access to MVPD service.<sup>108</sup> The most important information may be to note that sets not connected to an MVPD service may need additional equipment (*i.e.* converter box) or may have to be replaced. MVPDs must begin including these monthly notices 30 days after the effective date of the rules and must continue including them monthly through March 2009. Beginning approximately one year before the full-power transition and running through March 2009 ensures that subscribers will be exposed to educational messages throughout the remainder of the transition, and will have sufficient opportunity to act on them.<sup>109</sup>

39. The Letter suggested that the Commission consider requiring, "as a license condition or through customer service or other consumer protection or public interest requirements, all multichannel video programming distributors (MVPDs) to insert periodic notices in customer bills that inform consumers about the digital television transition and their customers' future viewing options, with civil penalties for noncompliance."<sup>110</sup> These notices would go to all MVPD subscribers and provide them with information about the full-power transition generally and about how it will affect their service specifically. The New York State Consumer Protection Board is primarily concerned that MVPD subscribers understand what effects, if any, the transition will have on their service.<sup>111</sup> The Benton Foundation not only supported this proposal, as "an optimal way to reach consumers that value television service," but also proposed a requirement that MVPDs run PSAs themselves.<sup>112</sup> The National Cable and Telecommunications Association states in its comments that the cable industry has not only committed to exceed the Commission's proposal, but those of the commenters.<sup>113</sup> The cable industry has committed to include DTV transition notices in subscriber bills, on a monthly basis beginning in 2008.<sup>114</sup> Indeed, these commitments have been made not only to the

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<sup>108</sup> For example, DBS carriers must provide additional notice to all subscribers who do not receive local broadcast signals via satellite. This additional notice would explain the steps that these subscribers would need to take to continue receiving broadcast signals, in particular the necessary steps if the subscriber relies on a tuner integrated into the DBS carrier's set-top box.

<sup>109</sup> These regulations do not supersede existing notice requirements that govern cable, such as 47 C.F.R. §§ 76.1601, 76.1603, and 76.1622.

<sup>110</sup> Letter at 3.

<sup>111</sup> Comments of New York State Consumer Protection Board at 2.

<sup>112</sup> Comments of Benton at 16-17; *see also* Comments of CAC at 22; Comments of Coalition of Organizations for Accessible Technology (COAT) at 10.

<sup>113</sup> Comments of NCTA at 2. *See also*, Comments of Verizon at 7; Reply of NTCA at 6.

<sup>114</sup> *Id.* at 6. Specifically, as to periodic bill notices, they state that "[i]n 2008, educational messages and reminders about the transition will be sent to all cable customers through monthly statements on invoices and 'bill stuffers' in cable bills." *See also*, Letter from Kyle McSillarow, President and CEO, NCTA, to the Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce, the Honorable Joe Barton, Ranking Member of the Committee on Energy and Commerce, (continued....)

Commission, but also to the Commerce Committees of both the United States House of Representatives and the United States Senate.<sup>115</sup> NCTA argues that, given these commitments, the Commission should not impose any requirements for MVPD DTV education efforts.

40. Of course, we welcome the efforts of NCTA and its members. We note, however, that the commitments of NCTA do not bind its member cable operators, and that, of course, it does not speak for all MVPDs. DIRECTV and EchoStar, while pledging active education efforts both for their subscribers and for OTA viewers state that they have no plans to provide periodic notices with bills.<sup>116</sup> Verizon, similarly, opposes the use of notices in bills, on the grounds that they would be expensive, ineffective, and potentially counterproductive.<sup>117</sup> We disagree with Verizon because the overall record in this proceeding indicates that bill notices would contribute significantly to consumer education efforts. Such notices would reach viewers who are engaged with television viewing and well positioned both to act on the information regarding any OTA sets they may have and to serve as a source of information for others.

41. Several industry commenters object that the Commission does not have statutory authority to impose the notice requirement.<sup>118</sup> We conclude, however, that we have ancillary authority to adopt notice requirements for Multichannel Video Programming Distributors under Titles I, III, and VI of the Communications Act of 1934, as amended (“Act”).<sup>119</sup> Courts have long recognized that, even in the absence of explicit statutory authority, the Commission has authority to promulgate regulations to effectuate the goals and provisions of the Act if the regulations are “reasonably ancillary to the effective performance of the Commission’s various responsibilities” under the Act.<sup>120</sup> The Supreme Court has

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the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and the Internet, and the Honorable Fred Upton, Ranking Member of the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, dated September 6, 2007, at 2 (“McSllarrow House Letter”).

<sup>115</sup> See generally, McSllarrow House Letter and Letter from Kyle McSllarrow, President and CEO, NCTA, to the Honorable Daniel K. Inouye, Chairman of the Committee on Commerce, Science and Transportation, and the Honorable Ted Stevens, Vice Chairman of the Committee on Commerce, Science and Transportation, U.S. Senate, dated September 6, 2007 (“McSllarrow Senate Letter”).

<sup>116</sup> Comments of EchoStar at 3; Comments of DIRECTV at 3.

<sup>117</sup> Comments of Verizon at 6.

<sup>118</sup> See, e.g., Comments of USTA at 11; Comments of Verizon at 15.

<sup>119</sup> 47 U.S.C. §§ 151, 152(a), 154(i), 154(o), 301, 303(r), 303(s), 336, 532, 534, 535, 542, 573.

<sup>120</sup> *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (upholding Commission regulation of cable television systems as a valid exercise of ancillary jurisdiction). See also *Rural Tel. Coalition v. FCC*, 838 F.2d 1307, 1315 (D.C. Cir. 1988) (upholding Commission authority to establish a “Universal Service Fund” in the absence of specific statutory authority as ancillary to FCC responsibilities under sections 1 and 4(i) of the Act); *GTE Serv. Corp. v. FCC*, 474 F.2d 724, 731 (continued....)



established a two-part ancillary jurisdiction test: (1) the subject of the regulation must be covered by the Commission's general grant of jurisdiction under Title I of the Communications Act; and (2) the regulation must be reasonably ancillary to the Commission's statutory responsibilities.<sup>121</sup> The requirements we adopt here regulate the disclosure obligations of companies providing services that fall within the Commission's jurisdiction under Titles I, III, and VI, advance our statutory obligation to promote the digital transition, and serve the public interest. We conclude, therefore, that we have ancillary jurisdiction to adopt DTV transition notice requirements in this proceeding.

42. For the most part, commenters do not argue that the Commission lacks jurisdiction over either the DTV transition or MVPDs.<sup>122</sup> Rather, they argue that requiring MVPDs to provide billing notices regarding the full-power DTV transition is not reasonably ancillary to our authority over either broadcast television or MVPDs. Verizon and NTCA both argue that there is no connection between multichannel distribution and the full-power broadcast television transition, and that this would be a broadcast regulation imposed on parties not engaged in broadcasting. On the contrary, MVPDs are an inextricable part of the television market. Both DBS and cable have mandatory carriage requirements, and all MVPDs have requirements concerning retransmission of broadcast signals.<sup>123</sup> Without the stations and viewers affected by this transition, MVPDs would be in a very different business. The Commission is statutorily obligated to promote the orderly transition to digital television, "a critical step in the evolution of broadcast television."<sup>124</sup> Further, the Commission is authorized to "make such rules and regulations . . . as may be necessary in the execution of its functions," and to "[m]ake such rules and regulations . . . not inconsistent with law, as may be necessary to carry out the provisions of this Act . . ."<sup>125</sup>

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(2d Cir. 1973) ("even absent explicit reference in the statute, the expansive power of the Commission in the electronic communications field includes the jurisdictional authority to regulate carrier activities in an area as intimately related to the communications industry as that of computer services, where such activities may substantially affect the efficient provision of reasonably priced communications service").

<sup>121</sup> See *American Library Ass'n v. FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) ("ALA").

<sup>122</sup> But see USTA's explication of the Commission's authority over transition education, discussed in paragraph 35, *infra*.

<sup>123</sup> 47 U.S.C. §§ 338, 534.

<sup>124</sup> 2002 Biennial Regulatory Review, 18 FCC Rcd 13620, 13825 (2003). See, e.g., 47 U.S.C. §§ 336 note (requiring the Commission to assign paired digital television channels "to further promote the orderly transition to digital television"), 336(b) (expressing Congressional interest in the transition from analog to digital television and reading, in pertinent part, "[i]n prescribing the regulations required by subsection (a), the Commission shall . . . (5) prescribe such other regulations as may be necessary for the protection of the public interest, convenience, and necessity.").

<sup>125</sup> *Id.* at §§ 154(i), 303(r).

43. The rules we adopt today advance these statutory mandates and serve the public interest. USTA argues that the connection between such notices and the Commission's DTV transition authority is weak, because "the customers who would receive those notices *do not rely on the broadcast signals that will cease on the transition date.*"<sup>126</sup> Many of those very customers do in fact rely on broadcast signals for at least some of the televisions in their homes.<sup>127</sup> Accurate and timely communication of the impending change from analog to digital transmission is a critical disclosure for all consumers. Not only will every DTV-educated consumer accelerate the spread of knowledge about the full-power transition, but as described in COAT's comments, many MVPD subscribers will in fact be directly impacted by the transition, even if only because they have some OTA sets in their home.<sup>128</sup> Furthermore, broadcast channels carried on a system will tend to be clearer and crisper as a result of the broadcaster switch to digital,<sup>129</sup> and every station broadcasting programming in HD, not just those carried pursuant to retransmission consent, will be available in HD.<sup>130</sup> As discussed above, over half of consumers still are not aware of the impending full-power digital transition.<sup>131</sup> Clearly, voluntary industry efforts to date have not been sufficient to ensure consumer awareness of the upcoming transition to digital television. Such consumer awareness is critical to our missions of promoting public safety and an orderly digital transition.<sup>132</sup>

44. Exercising ancillary jurisdiction to adopt DTV transition notice requirements for MVPDs is consistent with prior exercises of the Commission's

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<sup>126</sup> Comments of USTA at 15 (emphasis in original).

<sup>127</sup> See Comments of Benton at note 9 (citing May 2007 findings from Leichtman Research Group, Inc. that 9% of TV sets in cable households are broadcast-only, and 19% of TV sets in DBS households are broadcast-only, representing approximately 35 million television sets). Compare Comments of CEA at 4 (reporting that there are roughly 5.5 million households subscribing to cable and satellite that have at least one set receiving over-the-air signals and there are a total of 9.5 million over-the-air television sets in these households). See also, *In the Matter of Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, 22 FCC Rcd 9478, 9485 (2007) (in connection with the 2006 Competition Report, NAB reported that an additional 23.5 million television sets in 14.7 million MVPD households remain unconnected to the MVPD service).

<sup>128</sup> Comments of COAT at 9-10.

<sup>129</sup> See, generally, [www.DTV.gov](http://www.DTV.gov).

<sup>130</sup> *Carriage of Digital Television Broadcast Signals: Amendment to Part 76 of the Commission's Rules*, CS Docket No. 98-120, Third Report and Order and Third Further Notice of Proposed Rule Making, FCC 07-170 (Rel. Nov. 30, 2007) ("Cable Viewability Order").

<sup>131</sup> Reply of APTS at 1.

<sup>132</sup> See *Consumer Electronics Ass'n v. FCC*, 347 F.3d 291, 301-02 (D.C. Cir. 2003) (recognizing Congressionally mandated digital transition and Commission determination of consumer expectations that "the television they purchase . . . be able to receive over-the-air broadcast signals," and approving resulting Commission action to mandate DTV tuner phase-in).

authority. The Commission previously relied on its authority under the Act and the ACRA to impose an analog-only labeling requirement in order to promote the orderly transition to digital television.<sup>133</sup> In addition, the Commission recently relied on its ancillary jurisdiction in requiring interconnected Voice over Internet Protocol (“VoIP”) service providers to distribute to their subscribers stickers or labels warning if E911 service may be limited or unavailable, and to instruct subscribers to place them on or near the equipment used in conjunction with the interconnected VoIP service.<sup>134</sup> The Commission also has numerous other labeling and disclosure requirements designed to further its statutory objectives and to protect consumers.<sup>135</sup> In sum, therefore, we conclude that we have ancillary authority to adopt DTV transition notice requirements for MVPDs.

45. USTA makes two additional arguments about the limits of our ancillary jurisdiction in this case. First, it argues that because NTIA was given some express authority over DTV transition education, it “creates a strong presumption” that Congress did not mean for the Commission to have any authority in this area at all.<sup>136</sup> On the contrary, Congress had no need to give the Commission specific authority over any one element of the transition, because as discussed above we have general authority to promulgate rules to advance the transition.<sup>137</sup> USTA also argues, again almost in passing, that the Commission “may” not be permitted to exercise ancillary jurisdiction in any manner that could be seen as content-related regulation of speech. In support of this argument, USTA cites only the 2002 D.C. Circuit decision that struck down the Commission’s video description requirements.<sup>138</sup> *MPAA v. FCC* can not, however, be reasonably read to impose such a sweeping rule. The Court’s decision focuses on the inability of the Commission to rely on Section 1 of the Act as a source of authority for restricting programming content. In this case, Section 1 is not the primary source of the Commission’s authority, and programming content is not at issue. More to the

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<sup>133</sup> Labeling Order, 22 FCC Rcd. at ¶¶ 15-20.

<sup>134</sup> *IP-Enabled Services*, 20 FCC Rcd 10245, 10271 ¶ 48 (2005).

<sup>135</sup> See, e.g., *2003 Navigation Devices Second Report and Order and FNPRM*, 18 FCC Rcd 20885 (2003) (adopting technical, labeling and encoding rules to permit television sets to be built with “plug and play” functionality for one-way digital cable services); *Truth-in-Billing and Billing Format*, 20 FCC Rcd 6448 (2005) (mandating that billing practices, including line items, be truthful and non-misleading), *vacated on other grounds*, *NASUCA v. FCC*, 457 F.3d 1238 (11<sup>th</sup> Cir. 2006); 47 C.F.R. § 20.19 (labeling requirements for hearing-aid compatible mobile handsets).

<sup>136</sup> Comments of USTA at 13. The very Congressional inquiries that initiated this proceeding, however, make it clear that Congress does now and has always considered DTV transition education to be an integral part of the DTV transition which the Commission is leading. See, generally, Letter.

<sup>137</sup> Paragraph 5, *supra*.

<sup>138</sup> Comments of USTA at 14-15 (citing *Motion Picture Association of America, Inc. v FCC*, 309 F.3d 796 (D.C. Cir. 2002)).

point, the *MPAA* Court pointed to a clear Congressional directive that specifically spoke to video description and limited the Commission's sphere of authority to the creation of a report. Here, on the other hand, Congress has endowed the Commission with general authority to prescribe regulations that will "promote the orderly transition to digital television."<sup>139</sup>

### C. Consumer Electronics Manufacturer Notices

46. We require that parties that manufacture, import, or ship interstate television receivers and devices designed to work with television receivers (including digital-to-analog converter boxes like the NTIA Coupon Eligible Converter Boxes) include information with those devices explaining to consumers what effect, if any, the full-power DTV transition will have on their use. This information must be included with all devices shipped, beginning on the effective date of these rules, until March 31, 2009. As with the notices included in MVPD bills, the information may be in any form preferred by the manufacturer. It must be noticeable, contain the minimum information about the full-power transition described in paragraph 12, above, and explain clearly what impact, if any, the transition will have on the use of the device. For example, with receivers with a digital OTA tuner, one sufficient form of notice would be a sticker on the outside of the packaging that reads: "Digital Television Transition Notice: This television receiver will display over the air programming after the end of full-power analog broadcasting on February 17, 2009. Some older television receivers may need a converter box to display over the air digital programming, but should continue to work as before for some purposes (e.g., for watching LPTV, Class A, or translator stations still broadcasting in analog, watching pre-recorded movies, or playing video games). For more information, please call [the manufacturer], go to [www.DTV.gov](http://www.DTV.gov), or, for converter box information, go to [www.dtv2009.gov](http://www.dtv2009.gov) or call the NTIA at 1-888-DTV-2009."

47. As noted above, this requirement applies not only to television receivers, but also to electronic devices that are designed to be connected to, and are dependent on, television receivers. Notices included with these devices, which include DVD players and recorders, VCRs, and monitors, must not only provide the basic information about the transition. They must also make clear that, after the transition, the device will not serve its function, in regard to full-power OTA signals, unless connected to a device with a digital tuner.

48. The Letter suggested that the Commission consider requiring "manufacturers to include information with television receivers and related devices about the transition, with civil penalties for noncompliance."<sup>140</sup> The only commenter to oppose this proposal, LG, conceived of it applying only to "television sets," and

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<sup>139</sup> 47 U.S.C. § 336(b)(5), Note to section 336.

<sup>140</sup> Letter at 3.

argued that the existing Labeling Order already resolves this issue.<sup>141</sup> On the contrary, the Labeling Order's requirements apply only to sets without a digital receiver, which are no longer being manufactured for the US market.<sup>142</sup> Therefore the two sets of requirements do not overlap at all. The Benton Foundation suggests that the included information should be standardized by the Commission.<sup>143</sup>

49. No commenter challenged the Commission's statutory or constitutional authority to impose this requirement. As in the analog receiver labeling order,<sup>144</sup> our authority to impose this requirement is ancillary to our responsibilities under the Communications Act and the All Channel Receivers Act. An electronic device that is dependent for its use, in whole or in part, on over-the-air reception of television broadcast channels, is an "apparatus" "incidental to . . . transmission" of television broadcasts and, therefore, within the scope of our Title I subject matter jurisdiction.<sup>145</sup> As discussed in more detail in paragraphs 5 and 19-23, above, the Commission is statutorily obligated to promote the orderly transition to digital television. Ensuring that consumers know how it will affect their devices, and why they may suddenly stop working or change their functionality, is essential to achieving that goal.

#### **D. DTV.gov Partner Consumer Education Reporting**

50. We require DTV.gov Transition Partners to report their consumer education efforts, as a condition of continuing Partner status.<sup>146</sup> Reports should be filed into the record of this proceeding on a quarterly basis, beginning on April 10, 2008. Additionally, individual copies of the reports should be sent, via electronic mail or hard copy format, to the Chief and to the Chief of Staff of the Commission's Consumer and Governmental Affairs Bureau, as well as sent electronically to [dtvreporting@fcc.gov](mailto:dtvreporting@fcc.gov). This is in line with the Letter's suggestion that the Commission consider requiring "partners identified on the Commission's digital television Web site to report their specific consumer outreach efforts."<sup>147</sup>

51. We appreciate the efforts made so far by our DTV.gov Partners to keep us apprised of their consumer education and outreach activities. As we move closer to the full-power transition date, the Commission will necessarily be accelerating its efforts, and further emphasizing its role as the coordinator and clearinghouse for DTV transition education. As NAB and MSTV observe, "coordination is critical to

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<sup>141</sup> Comments of LG Electronic USA, Inc. ("LG") at 7.

<sup>142</sup> Labeling Order, 22 FCC Rcd. at ¶ 14; *see generally*, DTV Tuner Order, 17 FCC Rcd at 15978.

<sup>143</sup> Benton at 18.

<sup>144</sup> Labeling Order, 22 FCC Rcd. 8776.

<sup>145</sup> 47 U.S.C. § 153(33).

<sup>146</sup> Listed at [www.dtv.gov/partners.html](http://www.dtv.gov/partners.html).

<sup>147</sup> Letter at 4.

ensure that, in addition to messaging, industry, government agencies and other stakeholders are not either: (1) unnecessarily duplicating consumer education efforts or (2) failing to target key segments of the American population. The need for coordination is further underscored by the limited financial resources of the Commission.”<sup>148</sup> No commenters opposed this proposal, and several supported it.<sup>149</sup> Furthermore, NAB and MSTV describe the DTV Transition Coalition as already committed to regularly updating the Commission. Therefore, moving forward we will require that DTV.gov Partners provide us with quarterly updates on their specific consumer outreach efforts, and we anticipate that we will use this full range of information to work with Partners on future education efforts. Any Partner listed that fails to work with the Commission in this process may lose Partner status and be removed from the DTV.gov Partners page.

#### **E. Consumer Electronics Retailer Training and Education**

52. We adopt the suggestion in the letter that the Commission work “with NTIA to require retailers who participate in the converter box coupon program to detail their employee training and consumer information plans and have Commission staff conduct spot inspections to ascertain whether such objectives are being met at stores.”<sup>150</sup> A number of commenters are in favor of this proposal. The Telecommunications Regulatory Board of Puerto Rico supports it because “direct contact with customers will play a crucial role in educating people on the DTV transition.”<sup>151</sup> We agree that retailers can play a central role, and we plan to work with NTIA to ensure that retailers are fulfilling their commitment to the converter box program. As the Consumer Electronics Retailers Coalition has explained, consumer electronics retailers independently planned to engage in extensive employee training and consumer outreach regarding the transition.<sup>152</sup> These outreach efforts began early, as Radio Shack explains, with a standardized tip sheet developed and made available for distribution by all retailers.<sup>153</sup> Several large retailers, including Circuit City, Target, and Best Buy, assured the Commission of their intention to engage in extensive outreach, and have since demonstrated an admirable degree of focus, ingenuity, and dedication to the needs of viewers as they

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<sup>148</sup> Comments of NAB & MSTV at 14-15.

<sup>149</sup> *Id.*; Comments of Benton at 21; Comments of Nick Supuran at 1.

<sup>150</sup> Letter at 4.

<sup>151</sup> Comments of Telecommunications Regulatory Board of Puerto Rico at 5.

<sup>152</sup> Comments of CERC at 12-13.

<sup>153</sup> Comments of Radio Shack at 6. This conforms to the request of Commenter Nick Supuran. The Commission also has an independently developed DTV buying tip sheet that is available to consumer or for distribution by retailers. The Commission developed a DTV Tip Sheet in collaboration with CEA and CERC in 2004 and has updated the text as necessary. The Tip Sheet is available on [www.DTV.gov](http://www.dtv.gov/dtvtipsheet.pdf) (<http://www.dtv.gov/dtvtipsheet.pdf>) and has been distributed to retailers.

approach the digital transition.<sup>154</sup> Enforcement Bureau field agents will regularly visit participating retailer stores across the country to assess their employee training and consumer education efforts and whether the retailers' objectives are being met at stores. Through ongoing and close coordination, the Enforcement Bureau will provide the results of these site visits to NTIA for review and appropriate action. We appreciate and encourage these efforts on the part of retailers, particularly participants in the NTIA converter box program.

## **F. Other Proposals**

### **1. Federal Universal Service Low-Income Program Participant Notices**

53. We will require that all eligible telecommunications carriers ("ETCs") that receive federal universal service funds provide DTV transition information in the monthly bills of their Lifeline/Link-Up customers.<sup>155</sup> Similar to the requirements for MVPDs, the notice must be provided as a "bill stuffer" or as part of an information section on the bill itself. It must be noticeable, and state that on February 17, 2009, full-power analog broadcasting will end, and analog-only televisions may be unable to display full-power broadcast programming unless the viewer takes action. It must also note that viewers can get more information by going to [www.DTV.gov](http://www.DTV.gov), and more information about the converter box program by going to [www.dtv2009.gov](http://www.dtv2009.gov) or calling the NTIA at 888-DTV-2009. The notice may also, at the ETC's discretion, provide contact information for the DTV Transition Coalition. The notice should be provided in the same language or languages as the bill. If the ETC's Lifeline/Link-Up customer does not receive paper versions of either a bill or a notice of billing, then that customer must be provided with equivalent monthly transition notices in whatever medium they receive information about their monthly bill. Finally, ETCs that receive federal universal service funds must provide this same basic information as part of any other Lifeline or Link-Up publicity campaigns.<sup>156</sup> The customer bill notice requirement will run concurrently with the MVPD bill notice requirement (i.e., from 30 days after the effective date of

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<sup>154</sup> Circuit City ex parte (filed January 29, 2008); Target ex parte (filed January 29, 2008); Best Buy ex parte (filed January 22, 2008).

<sup>155</sup> Lifeline and Link-Up (Lifeline/Link-Up) are universal service low-income programs. Lifeline provides low-income consumers with discounts off of the monthly cost of telephone service for a single telephone line in their principal residence, while Link-Up provides low-income consumers with discounts off of the initial costs of installing telephone service. *See Lifeline and Link-Up*, WC Docket No. 03-109, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd 8302, 8306, para. 4 (2004); 47 C.F.R. Part 54, Subpart E (Universal Service Support for Low-Income Consumers).

<sup>156</sup> Sections 54.405(b) and 54.411(d) of the Commission's Rules require all ETCs to publicize the availability of Lifeline and Link-Up services in a manner reasonably designed to reach those likely to qualify for those services. 47 C.F.R. §§ 54.405(b), 54.411(d).

these rules through March 2009), and the publicity requirement will run for the same period.

54. The Letter suggested that the Commission “require, as an interim measure, that telecommunications carriers that receive funds under the Low Income Federal universal service program ... notify each of their low income customers of the digital transition and include such a notice in their required Lifeline and Link-Up publicity efforts.”<sup>157</sup> The strongest support for this requirement came from the New York State Consumer Protection Board, which suggested that “all telecommunications providers notify their low-income customers of the transition through their current Lifeline outreach efforts.”<sup>158</sup> The Benton Foundation and the Commission’s Consumer Affairs Committee both suggest that we should “encourage” telecommunications companies to engage in this type of outreach, particularly with their low income customers, but they do not support a mandate. Several commenters oppose the requirement, arguing that the Commission lacks a sufficient nexus to exercise ancillary jurisdiction. All argue that this would be unconstitutional compelled speech. We disagree with these commenters for the reasons explained in Section G, below.<sup>159</sup> Verizon also argues that this type of notice would confuse subscribers rather than educate them,<sup>160</sup> and that these notices would lead to flooding phone company call centers with questions about the DTV transition. Finally, NTCA claims that the IRFA is deficient because it does not mention LECs. We reject NTCA’s argument. The Commission provided sufficient notice, under the APA, that regulation of LECs was being considered.<sup>161</sup> Furthermore, the Commission’s FRFA has considered the possible economic impact on LECs as required under the RFA.<sup>162</sup> We agree with the consumer advocates, and adopt the above proposals.

55. We conclude that we have authority under Title I of the Act to impose the DTV Consumer Education requirements on ETCs that receive federal universal service funds.<sup>163</sup> Ancillary jurisdiction may be employed, in the Commission’s discretion, when Title I of the Act gives the Commission subject matter jurisdiction over the service to be regulated<sup>164</sup> and the assertion of jurisdiction is “reasonably

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<sup>157</sup> Letter at 4.

<sup>158</sup> Comments of New York State Consumer Protection Board at 2.

<sup>159</sup> See *infra* section III.G.

<sup>160</sup> Comments of Verizon at 7. See also Comments of Qwest at 2 and Reply of NTCA at 2.

<sup>161</sup> Notice at ¶ 17.

<sup>162</sup> See Appendix A, *infra*.

<sup>163</sup> See note 155, *supra*.

<sup>164</sup> See *Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968)., the lead case on the ancillary jurisdiction doctrine, upheld certain regulations applied to cable television systems at a time before the Commission had an express congressional grant of regulatory authority over that medium. See (continued....)



ancillary to the effective performance of [its] various responsibilities.”<sup>165</sup> Both predicates for ancillary jurisdiction are satisfied here.

56. First, Section 2(a) of the Act grants the Commission subject matter jurisdiction over [the services provided by] telecommunications carriers.<sup>166</sup> Section 254(e) provides that only eligible telecommunications carriers are eligible to receive federal universal service funds.<sup>167</sup> Therefore, all ETCs that receive federal universal service funds are telecommunications carriers, and as a result, are the subject of the Commission’s subject matter jurisdiction.

57. Second, our analysis requires us to evaluate whether imposing the DTV Consumer Education requirements is reasonably ancillary to the effective performance of the Commission’s various responsibilities. We find that Sections 309 and 1 of the Act provide the requisite nexus. Section 309 requires the Commission to “take such actions as are necessary ... to terminate all licenses for full-power television stations in the analog television service, and to require the cessation of broadcasting by full-power stations in the analog television service, by February 18, 2009 . . . .”<sup>168</sup> In a survey on the DTV transition, the GAO found that over-the-air households are more likely to have lower incomes than cable or satellite households and that approximately 48 percent of exclusive over-the-air viewers

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*id.* at 170-71. In *Midwest Video I*, the Supreme Court expanded upon its holding in *Southwestern Cable*. The plurality stated that “the critical question in this case is whether the Commission has reasonably determined that its origination rule will ‘further the achievement of long-established regulatory goals in the field of television broadcasting by increasing the number of outlets for community self-expression and augmenting the public’s choice of programs and types of services.’” *United States v. Midwest Video Corp.*, 406 U.S. 649, 667-68 (1972) (“*Midwest Video I*”) (quoting *Amendment of Part 74, Subpart K, of the Commission’s Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals*, Docket No. 18397, First Report and Order, 20 FCC 2d 201, 202 (1969) (“*CATV First Report and Order*”). The Court later restricted the scope of *Midwest Video I* by finding that if the basis for jurisdiction over cable is that the authority is ancillary to the regulation of broadcasting, the cable regulation cannot be antithetical to a basic regulatory parameter established for broadcast. See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 700 (1979) (“*Midwest Video II*”).

<sup>165</sup> *Southwestern Cable*, 392 U.S. at 178.

<sup>166</sup> Section 2(a) of the Act states that the Act applies “to all interstate and foreign communication by wire or radio . . . and to all persons engaged within the United States in such communication . . . .” 47 U.S.C. § 2(a).

<sup>167</sup> See 47 U.S.C. § 254(e).

<sup>168</sup> 47 U.S.C. § 309 Note. The Note to Section 309 was codified after the Digital Television and Public Safety Act of 2005 (DTV Act), which is Title III of the Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (2006), was signed into law.

have household incomes less than \$30,000.<sup>169</sup> The Commission already has in place the Lifeline/Link-Up programs that provide discounts off the initial installation and monthly costs of telephone service to millions of low-income consumers.<sup>170</sup> Because the DTV transition will greatly affect lower income households and the Lifeline/Link-Up programs already serve this same demographic, we have an already established communication path that can be used to further the success of the DTV transition. By communicating with these lower income households, we ensure that all Americans will have the knowledge they need in order to prepare for the DTV broadcast transition. We therefore find that the extension of the DTV Consumer Education requirements to ETCs that receive federal universal service funds and are required to advertise to low-income consumers is reasonably ancillary to the effective performance of our duty to ensure the success of the DTV transition under the Digital Television and Public Safety Act of 2005.

58. Further, Section 1 of the Act charges the Commission with responsibility for making available “a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . for the purpose of *promoting safety of life and property* through the use of wire and radio communication.”<sup>171</sup> In light of our statutory mandate to clear the broadcast spectrum for public safety use,<sup>172</sup> it is important that the Commission take all steps necessary to ensure that the DTV transition occurs without delay. Further, Americans’ reliance on their televisions for emergency alerts through the country’s Emergency Alert System<sup>173</sup> requires that we ensure that all Americans have the ability to receive emergency notifications through their televisions. If Americans are unable to receive this potential life-saving information because they are unaware of the DTV broadcast transition, this might result in tragic consequences. Therefore, ensuring that all Americans receive notice of the upcoming DTV transition, including those that have been identified as at risk of not receiving the necessary information, is a critical step to achieving our statutory mandate to promote public safety. Thus, we conclude that extending the

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<sup>169</sup> See Statement of Mark L. Goldstein, United States Government Accountability Office, Testimony Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives at 7 (Feb. 17, 2005), *available at* <http://www.gao.gov/new.items/d05258t.pdf>.

<sup>170</sup> See Wireline Competition Bureau, FCC, *Trends in Telephone Service Report*, Table 19.9 (Feb. 2007) (estimating that more than 7.1 million people paid reduced rates under the Lifeline program in 2005, and more than 1.7 million people paid reduced charges under the Link-Up program since 2005).

<sup>171</sup> 47 U.S.C. § 151 (emphasis added).

<sup>172</sup> See 47 U.S.C. § 309(j)(14)(B)(i)(II).

<sup>173</sup> See 47 C.F.R. § 11.1 *et seq.* EAS is a national public warning system that, together with other emergency notification mechanisms, is part of an overall public alert and warning system. See *Review of the Emergency Alert System*, EB Docket No. 04-296, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 18625, 18627, para. 5 (2005).

DTV Consumer Education requirements to ETCs that receive federal universal service funds is “reasonably ancillary to the effective performance of [our] responsibilities”<sup>174</sup> under Sections 309 and 1 of the Act, and “will ‘further the achievement of long-established regulatory goals’”<sup>175</sup> to ensure the success of the DTV transition and promote the safety of life and property.

## **2. 700 MHz Auction Winner Consumer Education Reporting**

59. We will require winning bidders in the 700 MHz spectrum auctions (Auctions 73 and 76) to detail what, if any, DTV transition consumer education efforts they are conducting. The Letter suggested that, “given the significant stake of 700 MHz auction winners in a successful transition, the Commission could require those entities to report their specific consumer outreach efforts.”<sup>176</sup> The rule we adopt conforms with this proposal. No commenters expressed opposition to this proposal.<sup>177</sup> Specifically, during the DTV transition we will require each entity obtaining a 700 MHz license to file this report with the Commission on a quarterly basis, with the first such report due by the tenth day of the first calendar quarter following the initial grant of the license authorization that the entity holds.

## **3. Consumer Contact Points**

60. With respect to comments regarding the need for a toll-free call center staffed with people skilled in answering questions about the full-power DTV transition, we emphasize that staff in the Commission’s existing Consumer Center, including Spanish speakers, are available to take calls and emails about all aspects of the DTV transition and have been specifically trained to inform and assist consumers with any questions or concerns they may have. In addition, we note that NTIA, as part of its DTV transition education initiative, has established a center devoted specifically to taking calls about digital-to-analog converter boxes and the coupon program. Since January 1, 2008, the center has been staffed with representatives able to field and respond to calls in multiple languages, including English, Spanish, Chinese, Vietnamese, Tagalog, Russian, and French. The Commission and NTIA are working to coordinate their consumer center activities with the goal of ensuring that calls and emails to either agency, in whatever

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<sup>174</sup> *Southwestern Cable*, 392 U.S. at 178.

<sup>175</sup> *Midwest Video I*, 406 U.S. at 667-68 (quoting *CATV First Report and Order*, 20 FCC 2d at 202).

<sup>176</sup> *Id.*

<sup>177</sup> Certain commenters supported not only a reporting requirement, but also a requirement that auction winners actually engage in some unspecified amount and type of consumer education. We support efforts by 700 MHz auction winners to provide consumer education on the DTV transition. To the extent that auction winners do conduct DTV outreach, the reporting requirement will better equip the Commission to coordinate all DTV transition outreach efforts across various industry sectors. Comments of PR at 5; Comments of Benton at 23-24.

language, are handled in a thorough, consistent manner and that consumers can be transferred, when appropriate, from one agency to the other.

#### G. First Amendment Analysis

61. The actions we take in this Order to ensure that television viewers are fully informed about the digital transition are entirely consistent with the First Amendment, because they are a narrowly tailored means of advancing the government's substantial interests in furthering the digital transition. The government's interests in promoting the continued availability of free television programming<sup>178</sup> and in ensuring a smooth transition from analog to digital full-power television service<sup>179</sup> are undoubtedly substantial. Free television service is a vital part of the Nation's communications system, and is particularly important for viewers who cannot afford other means of receiving video programming.<sup>180</sup> In order to ensure uninterrupted access to over-the-air television programming after the transition, it is essential that the viewing public understand that full power analog signals will cease on February 17, 2009, and that television equipment without a digital tuner will require additional equipment or connections to continue receiving programming after that date.

62. As discussed above, the record indicates that a substantial number of households are at risk of losing television service after February 17, 2009. Approximately 22.5 million households rely solely on over-the-air broadcast television, and of those households only seven percent currently own a digital television set.<sup>181</sup>

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<sup>178</sup> See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 646-647 (1994).

<sup>179</sup> See H.R. Rep. No. 276, 109th Cong., 1st Sess. 2005 (recognizing that the completion of the digital transition will expedite the benefits of digital television for the American consumers, clear spectrum for critical public safety and commercial uses; and the "increase in DTV programming, services, and equipment, and the provision of products and services that use the cleared spectrum, will improve America's global competitiveness and result in significant investment and innovation, boosting the U.S. economy and creating new jobs"). See also, *Second Periodic Review of the Commission's Rules and Policies Affecting the Conversion To Digital Television*, FCC 07-69, ¶¶ 9-14 (rel. May 3, 2007) (adopting a labeling requirement for analog-only television receivers while noting that "[t]he government has a strong interest in ensuring a timely conclusion of the digital transition"); *Requirements for Digital Television Receiving Capability*, 21 FCC Rcd. 9478, 9480, ¶ 7 (2006) (stating that "consumers must be able to receive digital TV signals for the DTV transition to move forward to a successful completion"); *Requirements for Digital Television Receiving Capability*, 20 FCC Rcd 18607, 18609, ¶ 6 (2005) (stating that consumers' ability to receive digital TV signals is essential to a successful completion of the DTV transition). See also Comments of NAB at i ("The future of free-over-the-air television depends upon a smooth transition to digital with minimum disruption to TV consumers").

<sup>180</sup> See *Turner*, 512 U.S. at 646-647. See also, Comments of Benton at 5 ("Television has never played a more important role in our lives. It is our primary source of news and entertainment and emergency alerts.").

<sup>181</sup> See Comments of CAC at 7. See also Comments of Benton at 6 (*citing* Statement of Mark L. Goldstein, United States Government Accountability Office (GAO), Testimony Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, (continued....))

Millions of households subscribing to an MVPD service have at least one set receiving over-the-air television signals.<sup>182</sup> The record indicates, however, that the majority of Americans remain unaware of the DTV transition. One recent survey reveals that 51.3% of Americans have no idea that the DTV transition is taking place, and only 19.8% are “very much aware” of the transition.<sup>183</sup> The government thus has a substantial interest in ensuring that the public is fully informed about the DTV transition and the steps necessary to continue receiving over-the-air broadcast signals after the transition.<sup>184</sup>

63. The consumer education requirements we adopt today are narrowly tailored to advance these substantial governmental interests. Our rules are targeted at the specific industry groups that are best positioned to reach households most at risk of losing television service in February 2009.<sup>185</sup> PSAs and crawls

(Continued from previous page)

House of Representatives, at 7 (Feb. 17, 2005) (GAO found that 19% or 20.8 million households rely exclusively on free over-the-air television)); Comments of CAC at 6 (citing 2005 GAO finding that 21 million homes – nearly one in five of all television-equipped households – rely on free, over-the-air broadcasts); Comments of CEA at 4 (estimating that approximately 11% of U.S. households rely solely on over-the-air broadcasting, which translates to 13.5 million households, and that those households own a total of 27 million television sets). *See also, In the Matter of Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, 22 FCC Rcd 9478, 9485 (2007) (noting that in connection with the 2006 Competition Report, NAB indicated that there were nearly 19.6 million households relying solely on over-the-air broadcast television, and that these households owned approximately 45.5 million sets of which only approximately 1.3 million were digital sets).

<sup>182</sup> Benton at note 9 (citing May 2007 findings from Leichtman Research Group, Inc. that 9% of TV sets in cable households are broadcast-only, and 19% of TV sets in DBS households are broadcast-only, representing approximately 35 million television sets). *Compare* CEA at 4 (reporting that there are roughly 5.5 million households subscribing to cable and satellite that have at least one set receiving over-the-air signals and there are a total of 9.5 million over-the-air television sets in these households). *See also, In the Matter of Third Periodic Review of the Commission’s Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, 22 FCC Rcd 9478, 9485 (2007) (in connection with the 2006 Competition Report, NAB reported that an additional 23.5 million television sets in 14.7 million MVPD households remain unconnected to the MVPD service).

<sup>183</sup> Reply of APTS at 1. *See also* Benton at 6, note 10 (*citing* APTS survey as reported Jan 31, 2007).

<sup>184</sup> The House Appropriations Committee recently expressed concern “about the approaching February 2009 deadline for transition to digital television (DTV) and the level of awareness in the general public concerning this deadline,” and particularly about the preparedness of “viewers in disadvantaged and lower-income communities, including Hispanic, African American, disabled, and senior citizen communities.” H.R. Rep. No. 207, 110<sup>th</sup> Cong., 1<sup>st</sup> Sess. 2007. *See also*, Comments of CEA at 5 (“Consumer education is the critical component of a smooth transition”); Comments of CAC at 7 (“The success of the DTV transition is dependent upon widespread consumer understanding of the benefits and mechanics of the transition”); Comments of Benton at 5 (“In order for the DTV transition to be successful, consumers must be well-informed and primed to adapt successfully to the new technology. This cannot occur unless there is a comprehensive, coordinated and robust national consumer outreach effort”).

<sup>185</sup> *See* Comments of Benton at 6-7 (citing to January 2007 APTS survey which indicates that 60% of Americans remain unaware of the DTV transition -- identifying low-income households, foreign language speakers and older Americans most at risk of losing TV service after the transition).

transmitted by the over-the-air broadcasters are, by definition, well-calculated to reach viewers of over-the-air television. But the record also shows that millions of MVPD customers use over-the-air broadcast as a secondary source of television service.<sup>186</sup> Requiring MVPDs to provide information regarding the digital transition in their bill inserts serves to ensure that MVPD households with additional over-the-air analog televisions will be prepared for the digital transition. Likewise, telecommunications carrier participants in the Low Income Federal Universal Service Program are uniquely situated to reach low-income households – one of the consumer groups identified as most at risk of losing television service after the transition.<sup>187</sup> And the steps we take with regard to manufacturers and retailers recognize the importance to consumers of information provided at the point-of-sale regarding the capabilities of the equipment that they are purchasing.

64. Industry groups have acknowledged the significant role they must play in informing consumers about the transition.<sup>188</sup> Thus, NAB reports that the broadcast industry has embarked on an “unparalleled and unprecedented” “multi-faceted” consumer education campaign designed to “reach out to all demographics, all geographical areas, urban and rural communities, the young and the old” that includes both PSAs and crawls.<sup>189</sup> NCTA reports that the cable industry has launched a \$200 million digital TV transition consumer education campaign which “seeks to reach all cable customers and millions of non-cable viewers with useful

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<sup>186</sup> See note 178, *supra*.

<sup>187</sup> See Comments of Benton at 6 (“The consumers most at risk of losing TV service after the transition – low income households, foreign-language speakers, older Americans – are the most vulnerable in our communities and the hardest to reach”); Statement of Mark L. Goldstein, United States Government Accountability Office, Testimony Before the Subcommittee on Telecommunications and the Internet, Committee on Energy and Commerce, House of Representatives at 7 (Feb. 17, 2005) (a GAO survey on the transition found that over-the-air households are more likely to have lower incomes than cable or satellite households and that approximately 48% of exclusive over-the-air viewers have household incomes less than \$30,000). *But see* Comments of USTA at 10 (*citing* a 2006 study examining users of Lifeline and Link-Up services in Florida which found that a majority of low-income families subscribed to cable or DBS).

<sup>188</sup> See, e.g., Comments of NCTA at 3 (“Over two years ago, the cable industry acknowledged that cable and other affected industries have an important role to play in ensuring that the transition from analog to digital broadcasting is successful for all American consumers”).

<sup>189</sup> Comments of NAB at 2. NAB explains that the education plan will include (i) a PSA package consisting of on-air announcements in both English and Spanish, a video package to help stations develop stories for their newscasts, story ideas and copy for stations to use in their newscasts, graphic elements that stations can use to create their own spots, 30-second advertisements, half-hour DTV educational TV program, crawls, non-English language spots; (ii) attending more than 20 regional and national conferences to better educate opinion leaders and communities disproportionately impacted by the DTV transition; (iii) the launch of a national DTV Road Show – a traveling media event that will reach more than 200 cities before February 2009; and (iv) a national DTV Speakers Bureau to directly educate consumers on the transition with over 8,000 speaking engagements nationwide. *Id.* at 6-8.

information about the transition to digital television” that includes invoice messages on billing statements.<sup>190</sup> DBS providers,<sup>191</sup> the consumer electronics industry,<sup>192</sup> retailers,<sup>193</sup> and video and telephone service providers<sup>194</sup> have all voluntarily committed to participate in efforts to educate the public about the DTV transition. Thus, to a large extent, the measures we adopt today do not impose an additional burden on the affected industries beyond their current voluntary efforts.

65. Despite their stake in the successful completion of the digital transition, broadcasters nonetheless argue that mandated PSAs and crawls constitute compelled speech in violation of the First Amendment.<sup>195</sup> We disagree.

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<sup>190</sup> Comments of NCTA at 3-4. NCTA states that the education campaign will consist of (i) airing \$200 million of English and Spanish language advertising on cable and broadcast television stations and networks; (ii) sending cable systems nationwide a customer communication “tool kit” which will include invoice messages to be included on billing statements, electronic messages for digital cable boxes, on-screen scrolls for local origination channels, telephone “on-hold” messaging for customer call centers, sample emails to be sent to broadband customers, and website “banners” for MSO and network websites; (iii) creating local origination and on-demand programming to provide a brief tutorial on the benefits of the digital transition and how cable can help customers navigate through it; (iv) sending educational messages and reminders about the transition to customers through monthly statements on invoices and “bill stuffers” in cable bills; and (v) other community outreach through brochures, websites, local programming, system-originated messaging and other communications with the public;

<sup>191</sup> Comments of DIRECTV at 2 (DIRECTV is planning its own independent public relations, advertising, and promotional campaigns that will run in 2008); Comments of EchoStar at 3 (educational outreach efforts include dedicated online information on the DISH Network website addressing digital transition issues; informational options for customers contacting its call centers; and information on Channel 101 of DISH Network).

<sup>192</sup> *See, e.g.*, Comments of CEA at 5-7 (consumer education efforts include operating various informational websites; distributing a DTV Toolkit for lawmakers that contained material for answering constituent questions about the transition; plans for producing HDTV Handbooks for Retailers and Consumers; developing and producing a number of short videos on topics such as the transition, converter boxes and HDTV for use on various websites and at retail locations; assisting in the development of PSAs; and exhibiting at relevant conferences); Comments of LG Electronics at 5-7 (education measures directed at both retailers and consumers include online tutorials about DTV and HDTV, an online consumer advisory about the transition and DTV transition options, enhancing sales training efforts, and enhancing its toll-free customer call center with additional Spanish-speaking customer service agents)

<sup>193</sup> Comments of CERC at 2-3 (voluntary efforts have included publishing a comprehensive Consumer Guide to the DTV Transition and the CECB Converter Box Program, maintaining DTV Transition information on its website, undertaking several joint public education efforts with the Commission, working with NTIA to facilitate the converter box program; in addition, member companies have instituted consumer educational and associate training measures).

<sup>194</sup> *See, e.g.*, Comments of Verizon at 4 (Verizon is voluntarily participating in national efforts to educate consumers about the transition, including “brief[ing] organizations representing consumers, seniors, the disabled, and the civil rights community, among others on the broadcast transition and the implementation of the converter-box coupon program”).

<sup>195</sup> Comments of NAB at 12-14.

First, we note that a less rigorous standard of First Amendment scrutiny applies where broadcasting is at issue.<sup>196</sup> Even if this were not the case, the government has broad powers to require the disclosure of “factual and uncontroversial information” where commercial speech is concerned, especially to “dissipate the possibility of consumer confusion or deception,” as long as such requirements are reasonably related to the government’s regulatory goals.<sup>197</sup> Here, the broadcaster PSAs and crawls we require are needed to eliminate any confusion stemming from the continuing public ignorance of the digital transition – in particular, they are necessary to ensure that over-the-air viewers are not misled into thinking that the analog signals that are now being transmitted will remain available after February 17, 2009. We also emphasize that the information we require about the digital transition is purely factual and not subject to dispute.<sup>198</sup> And so far as the broadcasters are concerned, our requirements involve commercial speech,<sup>199</sup> since they relate directly to the broadcasters’ economic interest in ensuring that viewers

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<sup>196</sup> *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 388 (1969). See also *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 637 (1994).

<sup>197</sup> *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 651-52 (1985) (upholding rule requiring attorneys who advertise contingent fee services must disclose that client may be liable for costs). Accord *National Electrical Manufacturers Ass’n v. Sorrell*, 272 F.2d 104, 113-16 (2d Cir. 2001), *cert. denied*, 536 U.S. 905 (2002) (rejecting First Amendment challenge to state requirement that manufacturers of products containing mercury – including fluorescent lightbulbs – include a label warning consumers of that fact and that the product should be disposed of as hazardous waste). See also *Environmental Defense Center, Inc. v. U.S. EPA*, 344 F.3d 832, 848-51 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004) (upholding requirement that providers of storm sewers that discharge into national waters educate the public about the impact of storm water discharge on water bodies and inform the public about the hazards of improper waste disposal).

<sup>198</sup> Our PSA and crawl requirements thus bear no resemblance to the controversial political compelled speech requirements at issue in *West Virginia State Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943) (holding unconstitutional a requirement that children in public schools salute the American flag), or in *Wooley v. Maynard*, 430 U.S. 705 (1977) (striking down as unconstitutional the requirement that individual drivers display “Live Free or Die” motto on state license plate), upon which NAB relies. Comments of NAB at 12-13. Quite plainly, informing the public about the upcoming DTV transition “is non-ideological; it involves no ‘compelled recitation of a message’ and ‘affirmation of belief.’” *Environmental Defense Center*, 344 F.3d at 850 (citation omitted).

<sup>199</sup> Simply because NCE broadcasters are “noncommercial entities” does not mean a higher First Amendment standard of scrutiny automatically applies. In this type of case, the critical inquiry is whether the speech at issue relates to “the economic interests of the speaker and the audience,” as was found with the electric utility in *Central Hudson*, and as found in this case with respect to broadcasters -- both commercial and NCEs. *Central Hudson Gas & Electric v. PSC of New York*, 447 U.S. 557, 561 (1980). Noncommercial stations have an economic interest in ensuring that their viewers continue to have access to their programming -- and continue to make donations to support it -- even though the stations do not sell advertising. In any event, because broadcasting is involved, a less rigorous standard of First Amendment scrutiny applies in this context. See *Red Lion*, 395 U.S. at 388.



maintain access to broadcast television and successfully transition to digital television.<sup>200</sup>

66. Similarly, we are not persuaded by the First Amendment objections raised by video service and telephone providers.<sup>201</sup> Both industry groups have a direct link to viewers who will be affected by the transition, and through direct communication with their customers they are invaluable in ensuring that the American public is prepared for the transition. Requiring MVPDs and Low Income Federal Universal Service Program participants to send notices to their customers about the DTV transition is thus a reasonable means of ensuring that word gets out to all groups that will be affected by the transition. It is thus a narrowly tailored means of advancing the government's substantial interests in ensuring a smooth and orderly transition.<sup>202</sup>

67. Nothing in the Supreme Court's plurality decision in *Pacific Gas & Elec. Co. v. Public Utility Comm'n of Calif.*, 475 U.S. 1 (1986),<sup>203</sup> is to the contrary.

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<sup>200</sup> For this reason, the Court's decision in *Riley v. National Fed'n of the Blind of N.C.*, 487 U.S. 781 (1988) (see Comments of NAB at 12), is inapposite. *Riley* involved state regulation of speech that the Court found was inextricably intertwined with fully protected political speech, see 487 U.S. at 796; the lesser standards applicable to commercial speech thus did not apply. We also find the circumstances in *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (see Comments of NAB at 12), distinguishable from the situation here. In *United Foods*, the Court sustained a compelled-subsidy challenge to an assessment whose *only purpose* was to fund generic mushroom advertising, which conveyed a message objectionable to respondent. 533 U.S. at 415-16. In contrast, the consumer education requirements we impose here are designed to further an overarching statutory mandate to move the Nation's broadcasting service from analog to digital and to which broadcasters are already subject. To the extent that broadcasters object that the requirements adopted in his Order effectively and unconstitutionally compel them to subsidize government speech by "donating" resources necessary for DTV education efforts, that objection misses the mark. A recent case that is instructive in this regard is *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005). That case arose from an Act of Congress announcing a policy of promoting the marketing and consumption of beef products and directing the Department of Agriculture to implement this policy. The resulting Department of Agriculture order required beef producers to contribute to a fund used to promote the marketing and consumption of beef products, and the producers challenged the order on First Amendment grounds. The Supreme Court rejected the challenge, noting that it had "generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns." *Id.* at 559; see also *Board of Regents of Univ. of Wisconsin Sys. v. Southworth*, 529 U.S. 217, 229 (2000) ("The government, as a general rule, may support valid programs and policies by taxes or other exactions binding on protesting parties. Within this broader principle it seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies").

<sup>201</sup> Comments of Verizon at 9-14; Comments of USTA at 4-11; NTCA Reply of NTCA at 3-4.

<sup>202</sup> Although no commenter challenged the Commission's constitutional authority to impose a requirement on manufacturers to include information with television receivers and related devices (see paragraph 31, *supra*), we find this requirement on manufacturers also to be within the permissible bounds of the First Amendment for the same reasons indicated above.

<sup>203</sup> See Comments of Verizon at 10, USTA Comments of USTA at 6.

In that case, the State agency ordered a utility to include in its billing envelopes a third-party newsletter containing a message with which the company disagreed.<sup>204</sup> The purpose of the agency order was, among other things, to assist groups ... that challenge [the utility] in the Commission's ratemaking proceedings in raising funds." The agency order thus did "not simply award access to the public at large; rather, it discriminate[d] on the basis of the viewpoints of the selected speakers."<sup>205</sup> In this case, by contrast, the message we require is purely factual and noncontroversial – it must only describe when the transition will occur, the listing of how consumers can obtain additional information, a very basic explanation of potential impact on the consumer and actions the consumer may take. There is nothing in the required disclosure that could interfere with the provider's ability to communicate its own message, and indeed the MVPD or telephone provider may use the opportunity to market its own service. For this reason, the requirements fall comfortably within the government's power to order reasonable disclosures to serve the public interest,<sup>206</sup> and will likewise empower consumers to take actions necessary to adjust to the digital transition.

#### IV. PROCEDURAL MATTERS

##### A. Final Regulatory Flexibility Analysis

68. As required by the Regulatory Flexibility Act of 1980 ("RFA"),<sup>207</sup> the Commission has prepared a Final Regulatory Flexibility Analysis ("FRFA") relating to this *Third Report and Order*. The FRFA is set forth in Appendix A.

##### B. Paperwork Reduction Act Analysis

69. This Report and Order was analyzed with respect to the Paperwork Reduction Act of 1995 ("PRA") and contains new information collection requirements, including the following: (1) broadcasters must provide information to their viewers about the DTV transition, and must report those efforts to the Commission and the public; (2) MVPDs must provide monthly notices about the DTV transition in their customer billing statements; (3) manufacturers of television

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<sup>204</sup> Comments of USTA at 15-16.

<sup>205</sup> *Id.* at 12-13.

<sup>206</sup> We note that in *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957, 981-83 (D.C. Cir. 1986), the D.C. Circuit upheld as constitutional a provision in the 1992 Cable Act requiring cable operators to give 30 days notice to subscribers before offering a free preview of premium channels which offer movies rated X, NC-17 or R. To the extent there was a First Amendment issue at all, the court found the provision's minimal burdens entirely reasonable to enable parents to decide whether they wished their families to have access to such programming. *Time Warner*, 93 F.3d at 981-83.

<sup>207</sup> See 5 U.S.C. § 604. The RFA, see 5 U.S.C. § 601 et. seq., has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996). The SBREFA was enacted as Title II of the Contract With America Advancement Act of 1996 ("CWAAA").

receivers and related devices must provide notice to consumers buying their devices of the transition's impact on that equipment; (4) DTV.gov Partners must provide the Commission with regular updates on their consumer education efforts; (5) ETCs that receive federal universal service funds must provide notice of the transition to their low income customers and potential customers; and (6) the winners of the 700 MHz spectrum auction will be required to report their consumer education efforts. The information collection requirements contained in this Report and Order will be submitted to the Office of Management and Budget ("OMB") for review under Section 3507(d) of the PRA.<sup>208</sup> The Commission will seek OMB approval for these information collection requirements and forms in accordance with OMB's emergency processing rules.<sup>209</sup> The Commission will publish a separate Federal Register Notice seeking comments from OMB, the general public, and other Federal agencies on the final information collection requirements contained in this proceeding. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, we will also seek specific comment on how we might "further reduce the information collection burden for small business concerns with fewer than 25 employees"<sup>210</sup> in the Federal Register Notice seeking comment on the information collections.

### C. Congressional Review Act

70. The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office, pursuant to the Congressional Review Act.<sup>211</sup>

### D. Additional Information

71. For more information on this *Report and Order*, please contact Lyle Elder, Lyle.Elder@fcc.gov, or Eloise Gore, Eloise.Gore@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120.

## V. ORDERING CLAUSES

72. IT IS ORDERED that, pursuant to the authority contained in Sections 4, 303, 614, and 615 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154, 303, 534, and 535, this Report and Order IS ADOPTED and the Commission's Rules ARE HEREBY AMENDED as set forth in Appendix B. We find good cause for the rules, forms and procedures adopted in this Report and Order to be effective upon publication of the summary of the Report and Order in the Federal Register to ensure that consumers are informed about the digital television transition on February 17, 2009, the statutory deadline for all full power television broadcasters

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<sup>208</sup> 44 U.S.C. § 3507(d).

<sup>209</sup> 5 C.F.R. §1320.13.

<sup>210</sup> The Small Business Paperwork Relief Act of 2002 ("SBPRA"), Pub. L. No. 107-198, 116 Stat 729 (2002) (codified in Chapter 35 of title 44 U.S.C.); See 44 U.S.C. 3506(c)(4).

<sup>211</sup> 5 U.S.C. § 801(a)(1)(A).

to transition to all digital service,<sup>212</sup> provided, however, that the rules, forms and requirements contain information collection requirements subject to the PRA and are not effective until approved by the OMB. The Commission will publish a notice in the Federal Register announcing when OMB approval for these rule sections has been received and thus when these rules will take effect.

73. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Final Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

74. IT IS FURTHER ORDERED that the Commission SHALL SEND a copy of this Report and Order in a report to be sent to Congress and the General Accounting Office pursuant to the Congressional Review Act, see 5 U.S.C. § 801(a)(1)(A).

#### FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>212</sup> See 5 U.S.C. § 553(d)(3) ("The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except...as otherwise provided by the agency for good cause found and published with the rule."). See also 47 C.F.R. §§ 1.103(a), 1.427(b). As described in this Order, the Commission has found that the public must be better informed regarding the digital television transition prior to its conclusion on February 17, 2009. Because of the limited period of time remaining prior to that date, we believe it is essential that coordinated, nationwide education efforts begin as soon as possible. Without sufficient accurate information to guide decisionmaking, consumers may be unprepared for the digital transition when it arrives, and may be unable to obtain critical information in emergencies after the transition. In such instances, consumers would be financially harmed and deprived of service at a critical time. Because delay can result in such harms to consumers and because affected parties will be afforded a reasonable opportunity to comply with the rule, we find that there is good cause to expedite the effective date of this rule. For these reasons, we are also requesting emergency PRA approval from OMB.

## APPENDIX A

## Final Regulatory Flexibility Act Analysis

1. As required by the Regulatory Flexibility Act of 1980, as amended (RFA),<sup>1</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated into the *Notice of Proposed Rulemaking (Notice)*.<sup>2</sup> The Commission sought written public comment on the proposals in the *Notice*, including comment on the IRFA. The comments responsive to the IRFA are discussed below. This present Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>3</sup>

**A. Need for, and Objectives of, the *Report and Order***

2. This *Report and Order* adopts rules requiring industry to participate in a coordinated, nationwide, consumer outreach campaign. Despite extensive consumer outreach efforts by the Commission and others, a large percentage of the public is not sufficiently informed about the DTV transition. This is a serious concern because the many benefits of the transition could be severely limited by insufficient consumer awareness. Therefore, this *Report and Order* adopts a number of proposals based on specific potential Commission initiatives raised by Congressmen Dingell and Markey.<sup>4</sup> Our goals in doing so are to further educate consumers about the digital television transition; to engage all sectors of the television industry in support of that transition; and, in so doing, to facilitate the nation's transition to digital broadcast television.

3. First, the rules require all full-power television broadcasters to provide on-air transition education to their viewers. Broadcasters must comply with one of three alternative sets of rules in providing such information to their viewers and must report these consumer education and outreach efforts to the Commission and the public. Second, MVPDs must provide monthly notices about the DTV transition in their customer billing statements.<sup>5</sup> Third, manufacturers of television receivers and related devices must provide notice to consumers of the transition's impact on that equipment. Fourth, DTV.gov Partners must provide the Commission with

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<sup>1</sup> See 5 U.S.C. § 603. The RFA, see 5 U.S.C. § 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

<sup>2</sup> *DTV Consumer Education Initiative*, MB Docket No. 07-148, Notice of Proposed Rulemaking, 22 FCC Rcd 14091 (2007) (DTV Consumer Education NPRM).

<sup>3</sup> See 5 U.S.C. § 604.

<sup>4</sup> See *Report and Order* note 4, *supra*.

<sup>5</sup> The information must also be made available to customers who rely on electronic or automatic billing.

regular updates on their consumer education efforts. Fifth, companies participating in the Low Income Federal Universal Service Program must provide notice of the transition to their low income customers and potential customers. Sixth, the winners of the 700 MHz spectrum auction must report their consumer education efforts to the Commission and the public.

**B. Summary of Issues Raised by Public Comments in Response to the IRFA**

4. We received one comment in response to the IRFA. The Reply Comments of the National Telecommunications Cooperative Association and the Organization for the Promotion and Advancement of Small Telecommunications Companies (Collectively, NTCA/OPASTCO) filed comments expressing concern about the lack of reference to local exchange carriers (LECs) in Section C of the IRFA. NTCA/OPASTCO argued that the absence of LECs from the IRFA constituted a failure to consider those operators, thus rendering the IRFA deficient as to small telephone providers. We disagree, and find that sufficient notice was clearly provided to LECs and their representatives, as demonstrated by the comments and replies filed in this docket.<sup>6</sup> We find that the interests of small operators, like NTCA/OPASTCO's members, have been considered throughout the rulemaking process.

**C. Description and Estimate of the Number of Small Entities to Which the *Report and Order* Will Apply**

5. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules adopted herein.<sup>7</sup> The RFA defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small business concern" under Section 3 of the Small Business Act.<sup>8</sup> Under the Small Business Act, a small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).<sup>9</sup> The rules adopted herein will directly affect small television broadcast stations, small MVPDs (cable operators and satellite carriers) and other small entities, such as LECs, consumer electronics (CE) retailers and CE manufacturers. A description of these small

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<sup>6</sup> See, e.g., Comments of USTA, Comments of Verizon, Comments of Qwest, Reply of NTCA/OPASTCO.

<sup>7</sup> 5 U.S.C. § 604(b).

<sup>8</sup> 5 U.S.C. § 601(3) and (6).

<sup>9</sup> 15 U.S.C. § 632.

entities, as well as an estimate of the number of such small entities, is provided below.

6. *Television Broadcasting.* The SBA defines a television broadcasting station as a small business if such station has no more than \$13.0 million in annual receipts.<sup>10</sup> Business concerns included in this industry are those “primarily engaged in broadcasting images together with sound.”<sup>11</sup> The Commission has estimated the number of licensed commercial television stations to be 1,376.<sup>12</sup> According to Commission staff review of the BIA Publications, Inc. Master Access Television Analyzer Database (BIA) on March 30, 2007, about 986 of an estimated 1,374 commercial television stations<sup>13</sup> (or approximately 72 percent) have revenues of \$13.0 million or less and thus qualify as small entities under the SBA definition. We note, however, that, in assessing whether a business concern qualifies as small under the above definition, business (control) affiliations<sup>14</sup> must be included. Our estimate, therefore, likely overstates the number of small entities that might be affected by our action, because the revenue figure on which it is based does not include or aggregate revenues from affiliated companies. The Commission has estimated the number of licensed noncommercial educational (NCE) television stations to be 380.<sup>15</sup> The Commission does not compile and otherwise does not have access to information on the revenue of NCE stations that would permit it to determine how many such stations would qualify as small entities.

7. In addition, an element of the definition of “small business” is that the entity not be dominant in its field of operation. We are unable at this time to define

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<sup>10</sup> See 13 C.F.R. § 121.201, NAICS Code 515120.

<sup>11</sup> *Id.* This category description continues, “These establishments operate television broadcasting studios and facilities for the programming and transmission of programs to the public. These establishments also produce or transmit visual programming to affiliated broadcast television stations, which in turn broadcast the programs to the public on a predetermined schedule. Programming may originate in their own studios, from an affiliated network, or from external sources.” Separate census categories pertain to businesses primarily engaged in producing programming. See Motion Picture and Video Production, NAICS code 512110; Motion Picture and Video Distribution, NAICS Code 512120; Teleproduction and Other Post-Production Services, NAICS Code 512191; and Other Motion Picture and Video Industries, NAICS Code 512199.

<sup>12</sup> See News Release, “Broadcast Station Totals as of December 31, 2006” 2007 WL 221575 (dated Jan. 26, 2007) (“*Broadcast Station Totals*”); see [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-269784A1.doc](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269784A1.doc).

<sup>13</sup> We recognize that this total differs slightly from that contained in Broadcast Station Totals, supra FRFA note 23; however, we are using BIA’s estimate for purposes of this revenue comparison.

<sup>14</sup> “[Business concerns] are affiliates of each other when one concern controls or has the power to control the other or a third party or parties controls or has to power to control both.” 13 C.F.R. § 121.103(a)(1).

<sup>15</sup> See *Broadcast Station Totals*, supra FRFA note 11.

or quantify the criteria that would establish whether a specific television station is dominant in its field of operation. Accordingly, the estimate of small businesses to which rules may apply do not exclude any television station from the definition of a small business on this basis and are therefore over-inclusive to that extent. Also as noted, an additional element of the definition of “small business” is that the entity must be independently owned and operated. We note that it is difficult at times to assess these criteria in the context of media entities and our estimates of small businesses to which they apply may be over-inclusive to this extent.

8. *Class A TV, LPTV, and TV translator stations.* The rules adopted herein may also apply to licensees of Class A TV stations, low power television (LPTV) stations, and TV translator stations, as well as to potential licensees in these television services. The same SBA definition that applies to television broadcast licensees would apply to these stations. The SBA defines a television broadcast station as a small business if such station has no more than \$13.0 million in annual receipts.<sup>16</sup> Currently, there are approximately 567 licensed Class A stations, 2,227 licensed LPTV stations, 4,518 licensed TV translators and 11 TV booster stations.<sup>17</sup> Given the nature of these services, we will presume that all of these licensees qualify as small entities under the SBA definition. We note, however, that under the SBA’s definition, revenue of affiliates that are not LPTV stations should be aggregated with the LPTV station revenues in determining whether a concern is small. Our estimate may thus overstate the number of small entities since the revenue figure on which it is based does not include or aggregate revenues from non-LPTV affiliated companies. We do not have data on revenues of TV translator or TV booster stations, but virtually all of these entities are also likely to have revenues of less than \$13.0 million and thus may be categorized as small, except to the extent that revenues of affiliated non-translator or booster entities should be considered.

9. *Cable and Other Subscription Programming.* The SBA has developed a small business size standard for cable and other subscription programming, which includes all such companies generating \$13.5 million or less in revenue annually.<sup>18</sup> This category includes, among others, cable operators, direct broadcast satellite services, fixed-satellite services, home satellite dish services, multipoint distribution services, multichannel multipoint distribution service, instructional television fixed service, local multipoint distribution service, satellite master antenna television systems, and open video systems.<sup>19</sup> According to Census Bureau data, there are

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<sup>16</sup> See 13 C.F.R. § 121.201, NAICS Code 515120.

<sup>17</sup> See *Broadcast Station Totals*, *supra* FRFA note 11.

<sup>18</sup> 13 C.F.R. § 121.201 (NAICS Code 515210).

<sup>19</sup> Those MVPDs relying primarily or exclusively on satellite transmission could also be considered to fall under the “Satellite Telecommunications” category. 13 C.F.R. § 121.201 (NAICS Code 517410).



1,311 total cable and other pay television service firms that operate throughout the year of which 1,180 have less than \$10 million in revenue.<sup>20</sup> Consequently, the Commission estimates that the majority of providers in this service category are small businesses that may be affected by the rules adopted herein. We address below each service individually to provide a more precise estimate of small entities.

10. *Cable Television Distribution Services.* Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies.” The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees.<sup>21</sup> To gauge small business prevalence for these cable services we must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having \$13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under \$10 million, and 43 firms had receipts of \$10 million or more but less than \$25 million. Thus, the majority of these firms can be considered small.

11. *Cable System Operators (Rate Regulation Standard).* The Commission has developed its own small business size standard for cable system operators, for purposes of rate regulation. Under the Commission’s rules, a “small cable company” is one serving fewer than 400,000 subscribers nationwide.<sup>22</sup> The most recent estimates indicate that there were 1,439 cable operators who qualified as small cable system operators at the end of 1995.<sup>23</sup> Since then, some of those companies

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<sup>20</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Subject Series - Establishment and Firm Size, Information Sector 51, Table 4 at 50 (2000). The amount of \$10 million was used to estimate the number of small business firms because the relevant Census categories stopped at \$9,999,999 and began at \$10,000,000. No category for \$12.5 million existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>21</sup> 13 C.F.R. § 121.201 (NAICS Code 517210).

<sup>22</sup> 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determination that a small cable system operator is one with annual revenues of \$100 million or less. *See Implementation of Sections of the 1992 Cable Act: Rate Regulation, Sixth Report and Order and Eleventh Order on Reconsideration*, 10 FCC Rcd 7393 (1995).

<sup>23</sup> Paul Kagan Associates, Inc., Cable TV Investor, February 29, 1996 (based on figures for December 30, 1995).

may have grown to serve more than 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, the Commission estimates that there are now fewer than 1,439 small entity cable system operators that may be affected by the rules and policies adopted herein.

12. *Cable System Operators (Telecom Act Standard).* The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is “a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000.”<sup>24</sup> The Commission has determined that there are 67,700,000 subscribers in the United States.<sup>25</sup> Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate.<sup>26</sup> Based on available data, the Commission estimates that the number of cable operators serving 677,000 subscribers or fewer, totals 1,450. The Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million,<sup>27</sup> and therefore is unable, at this time, to estimate more accurately the number of cable system operators that would qualify as small cable operators under the size standard contained in the Communications Act of 1934.

13. *Satellite Carriers.* The term “satellite carrier” includes entities providing services as described in 17 U.S.C. § 119(d)(6) using the facilities of a satellite or satellite service licensed under Part 25 of the Commission’s rules to operate in Direct Broadcast Satellite (DBS) or Fixed-Satellite Service (FSS)

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<sup>24</sup> 47 U.S.C. § 543(m)(2).

<sup>25</sup> See Public Notice, “FCC Announces New Subscriber Count for the Definition of Small Cable Operator,” 16 FCC Rcd 2225 (2001) (“*2001 Subscriber Count PN*”). In this Public Notice, the Commission established the threshold for determining whether a cable operator meets the definition of small cable operator at 677,000 subscribers, and determined that this threshold will remain in effect until the Commission issues a superseding Public Notice. We recognize that the number of cable subscribers was recently estimated by the Commission to be 65.4 million in June 2005; see *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Twelfth Annual Report*, 21 FCC Rcd 2503, 2507, ¶ 10 (2006) (“*2005 Cable Competition Report*”). However, because the Commission has not issued a public notice subsequent to the *2001 Subscriber Count PN*, we propose to rely on the subscriber count threshold established by the *2001 Subscriber Count PN*.

<sup>26</sup> 47 C.F.R. § 76.901(f).

<sup>27</sup> The Commission does receive such information on a case-by-case basis if a cable operator appeals a local franchise authority’s finding that the operator does not qualify as a small cable operator pursuant to § 76.901(f) of the Commission’s rules. See 47 C.F.R. § 76.909(b).

frequencies.<sup>28</sup> As a general practice, not mandated by any regulation, DBS licensees usually own and operate their own satellite facilities as well as package the programming they offer to their subscribers. In contrast, satellite carriers using FSS facilities often lease capacity from another entity that is licensed to operate the satellite used to provide service to subscribers. These entities package their own programming and may or may not be Commission licensees themselves. In addition, a third situation may include an entity using a non-U.S. licensed satellite to provide programming to subscribers in the United States pursuant to a blanket earth station license.<sup>29</sup>

14. *Direct Broadcast Satellite (DBS) Service.* DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic “dish” antenna at the subscriber’s location. Because DBS provides subscription services, DBS falls within the SBA-recognized definition of Cable and Other Subscription Programming.<sup>30</sup> This definition provides that a small entity is one with \$13.5 million or less in annual receipts.<sup>31</sup> Currently, only two operators – DirecTV<sup>32</sup> and EchoStar Communications Corporation (“EchoStar”)<sup>33</sup> – hold licenses to provide DBS service, which requires a great investment of capital for operation. Both currently offer subscription services and report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS licensee. Nevertheless, given the absence of specific data on this point, we acknowledge the possibility that there are entrants in this field that may not yet have generated \$13.5 million in annual receipts, and therefore may be categorized as a small business, if independently owned and operated.

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<sup>28</sup> Part 100 of the Commission’s rules was eliminated in 2002 and now both FSS and DBS satellite facilities are licensed pursuant to Part 25 of the rules. *Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331 (2002); 47 C.F.R. § 25.148.

<sup>29</sup> See, e.g., *Application Of DirecTV Enterprises, LLC, Request For Special Temporary Authority for the DirecTV 5 Satellite*; *Application Of DirecTV Enterprises, LLC, Request for Blanket Authorization for 1,000,000 Receive Only Earth Stations to Provide Direct Broadcast Satellite Service in the U.S. using the Canadian Authorized DirecTV 5 Satellite at the 72.5° W.L. Broadcast Satellite Service Location*, 19 FCC Rcd. 15529 (Sat. Div. 2004).

<sup>30</sup> 13 C.F.R. § 121.201 (NAICS Code 515210).

<sup>31</sup> *Id.*

<sup>32</sup> DirecTV is the largest DBS operator and the second largest MVPD, serving an estimated 14.67 million subscribers nationwide, as of June 2005; see *2005 Cable Competition Report*, 21 FCC Rcd at 2540 ¶ 73.

<sup>33</sup> EchoStar, which provides service under the brand name Dish Network, is the second largest DBS operator and the third largest MVPD, serving an estimated 11.45 million subscribers nationwide, as of June 2005. *Id.*

15. *Fixed-Satellite Service (“FSS”).* The FSS is a radiocommunication service between earth stations at a specified fixed point or between any fixed point within specified areas and one or more satellites.<sup>34</sup> The FSS, which utilizes many earth stations that communicate with one or more space stations, may be used to provide subscription video service. Therefore, to the extent FSS frequencies are used to provide subscription services, FSS falls within the SBA-recognized definition of Cable and Other Subscription Programming, which includes all such companies generating \$13.5 million or less in revenue annually.<sup>35</sup> Although a number of entities are licensed in the FSS, not all such licensees use FSS frequencies to provide subscription services. Both of the DBS licensees (EchoStar and DirecTV) have indicated interest in using FSS frequencies to broadcast signals to subscribers. It is possible that other entities could similarly use FSS frequencies, although we are not aware of any entities that might do so.

16. *Private Cable Operators (PCOs) also known as Satellite Master Antenna Television (SMATV) Systems.* PCOs, also known as SMATV systems or private communication operators, are video distribution facilities that use closed transmission paths without using any public right-of-way. PCOs acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. The SBA definition of small entities for Cable and Other Subscription Programming includes PCOs and, thus, small entities are defined as all such companies generating \$13.5 million or less in annual receipts.<sup>36</sup> Currently, there are more than 150 members in the Independent Multi-Family Communications Council (IMCC), the trade association that represents PCOs.<sup>37</sup> Individual PCOs often serve approximately 3,000-4,000 subscribers, but the larger operations serve as many as 15,000-55,000 subscribers. In total, PCOs currently serve approximately one million subscribers.<sup>38</sup> Because these operators are not rate regulated, they are not required to file financial data with the Commission. Furthermore, we are not aware of any privately published financial information regarding these operators. Based on the estimated number of operators and the estimated number of units served by the largest ten PCOs, we believe that a substantial number of PCOs qualify as small entities.

17. *Home Satellite Dish (HSD) Service.* Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Cable and

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<sup>34</sup> See 47 C.F.R. § 2.1(c).

<sup>35</sup> 13 C.F.R. § 121.201, NAICS code 515210.

<sup>36</sup> 13 C.F.R. § 121.201 (NAICS Code 515210).

<sup>37</sup> See *2005 Cable Competition Report*, 21 FCC Rcd 2564-65, ¶ 130.

<sup>38</sup> See *id.*

Other Subscription Programming, which includes all such companies generating \$13.5 million or less in revenue annually.<sup>39</sup> HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. There are approximately 30 satellites operating in the C-band, which carry more than 500 channels of programming combined; approximately 350 channels are available free of charge and 150 are scrambled and require a subscription. HSD is difficult to quantify in terms of annual revenue. HSD owners have access to program channels placed on C-band satellites by programmers for receipt and distribution by MVPDs. Commission data show that, as of June 2005, there were 206,358 households authorized to receive HSD service.<sup>40</sup> The Commission has no information regarding the annual revenue of the four C-Band distributors.

18. *Open Video Systems (OVS)*. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services,<sup>41</sup> OVS falls within the SBA-recognized definition of Cable and Other Subscription Programming, which provides that a small entity is one with \$13.5 million or less in annual receipts.<sup>42</sup> The Commission has certified 25 OVS operators with some now providing service. Broadband service providers (BSPs) are currently the only significant holders of OVS certifications or local OVS franchises, even though OVS is one of four statutorily-recognized options for local exchange carriers (LECs) to offer video programming services.<sup>43</sup> As of June 2005, BSPs served approximately 1.4 million subscribers, representing 1.5 percent of all MVPD households.<sup>44</sup> Affiliates of Residential Communications Network, Inc. ("RCN"), which serves about 371,000 subscribers as of June 2005, is currently the largest BSP and 14th largest MVPD.<sup>45</sup>

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<sup>39</sup> 13 C.F.R. § 121.201 (NAICS Code 515210).

<sup>40</sup> See *2005 Cable Competition Report*, 21 FCC Rcd 2544, ¶ 80.

<sup>41</sup> See 47 U.S.C. § 573.

<sup>42</sup> 13 C.F.R. § 121.201 (NAICS Code 515210).

<sup>43</sup> See *2005 Cable Competition Report*, 21 FCC Rcd 2549, ¶ 88. BSPs are newer firms that are building state-of-the-art, facilities-based networks to provide video, voice, and data services over a single network.

<sup>44</sup> See *id.* at 2507, ¶ 14.

<sup>45</sup> See *id.* at 2549, ¶ 89. WideOpenWest is the second largest BSP and 16th largest MVPD, with cable systems serving about 292,000 subscribers as of June 2005. The third largest BSP is Knology, which currently serves approximately 170,800 subscribers as of June 2005. *Id.*

RCN received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. The Commission does not have financial information regarding the entities authorized to provide OVS, some of which may not yet be operational. We thus believe that at least some of the OVS operators may qualify as small entities.

19. *Wireless Cable Systems.* Wireless cable systems use the Broadband Radio Service (“BRS”), formerly Multipoint Distribution Service (“MDS”),<sup>46</sup> and Educational Broadband Service (“EBS”), formerly Instructional Television Fixed Service (“ITFS”),<sup>47</sup> frequencies in the 2 GHz band to transmit video programming and provide broadband services to residential subscribers.<sup>48</sup> These services were originally designed for the delivery of multichannel video programming, similar to that of traditional cable systems, but over the past several years licensees have focused their operations instead on providing two-way high-speed Internet access services.<sup>49</sup> We estimate that the number of wireless cable subscribers is approximately 100,000, as of March 2005. *Id.* Local Multipoint Distribution Service (“LMDS”) is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications.<sup>50</sup> As previously noted, the SBA definition of small entities for Cable and Other Subscription Programming, which provides that a small entity is one with \$13.5 million or less in annual receipts,<sup>51</sup> appears applicable to MDS, ITFS and LMDS.

20. *Wireless Cable Systems (Commission Auction Standard).* The Commission has defined small MDS (now BRS) and LMDS entities in the context of

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<sup>46</sup> MDS, also known as Multichannel Multipoint Distribution Service (“MMDS”), is regulated by Part 21 of the Commission’s rules; see 47 C.F.R. Part 21, subpart K; and has been renamed the Broadband Radio Service (BRS); see *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission’s Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands; Part 1 of the Commission’s Rules - Further Competitive Bidding Procedures; Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and the Instructional Television Fixed Service Amendment of Parts 21 and 74 to Engage in Fixed Two-Way Transmissions; Amendment of Parts 21 and 74 of the Commission’s Rules With Regard to Licensing in the Multipoint Distribution Service and in the Instructional Television Fixed Service for the Gulf of Mexico*; 19 FCC Rcd 14165 (2004) (“*MDS/ITFS Order*”).

<sup>47</sup> ITFS systems are regulated by Part 74 of the Commission’s rules; see 47 C.F.R. Part 74, subpart I. ITFS, an educational service, has been renamed the Educational Broadband Service (EBS); see *MDS/ITFS Order*, 19 FCC Rcd 14165. ITFS licensees, however, are permitted to lease spectrum for MDS operation.

<sup>48</sup> See *2005 Cable Competition Report*, 21 FCC Rcd 2565, ¶ 131.

<sup>49</sup> *Id.*

<sup>50</sup> See *Local Multipoint Distribution Service*, 12 FCC Rcd 12545 (1997) (“*LMDS Order*”).

<sup>51</sup> 13 C.F.R. § 121.201 (NAICS Code 515210).

Commission license auctions. In the 1996 MDS auction,<sup>52</sup> the Commission defined a small business as an entity that had annual average gross revenues of less than \$40 million in the previous three calendar years.<sup>53</sup> This definition of a small entity in the context of MDS auctions has been approved by the SBA.<sup>54</sup> In the MDS auction, 67 bidders won 493 licenses. Of the 67 auction winners, 61 claimed status as a small business. At this time, the Commission estimates that of the 61 small business MDS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent MDS licensees that have gross revenues that are not more than \$40 million and are thus considered small entities.<sup>55</sup> MDS licensees and wireless cable operators that did not participate in the MDS auction must rely on the SBA definition of small entities for Cable and Other Subscription Programming. Information available to us indicates that there are approximately 850 of these licensees and operators that do not generate revenue in excess of \$13.5 million annually. Therefore, we estimate that there are approximately 850 small MDS (or BRS) providers as defined by the SBA and the Commission's auction rules.

21. Educational institutions are included in this analysis as small entities; however, the Commission has not defined a small business size standard for ITFS (now EBS).<sup>56</sup> We estimate that there are currently 2,032 ITFS (or EBS) licensees, and all but 100 of these licenses are held by educational institutions. Thus, the Commission estimates that at least 1,932 ITFS licensees are small businesses.

22. In the 1998 and 1999 LMDS auctions,<sup>57</sup> the Commission defined a small business as an entity that had annual average gross revenues of less than \$40

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<sup>52</sup> MDS Auction No. 6 began on November 13, 1995, and closed on March 28, 1996. (67 bidders won 493 licenses.)

<sup>53</sup> 47 C.F.R. § 21.961(b)(1).

<sup>54</sup> See *ITFS Order*, 10 FCC Rcd at 9589.

<sup>55</sup> 47 U.S.C. § 309(j). Hundreds of stations were licensed to incumbent MDS licensees prior to implementation of Section 309(j) of the Communications Act of 1934, 47 U.S.C. § 309(j). For these pre-auction licenses, the applicable standard is SBA's small business size standards for "other telecommunications" (annual receipts of \$12.5 million or less). See 13 C.F.R. § 121.201, NAICS code 517910.

<sup>56</sup> In addition, the term "small entity" under SBREFA applies to small organizations (nonprofits) and to small governmental jurisdictions (cities, counties, towns, townships, villages, school districts, and special districts with populations of less than 50,000). 5 U.S.C. §§ 601(4)-(6). We do not collect annual revenue data on ITFS licensees.

<sup>57</sup> The Commission has held two LMDS auctions: Auction 17 and Auction 23. Auction No. 17, the first LMDS auction, began on February 18, 1998, and closed on March 25, 1998. (104 bidders won 864 licenses.) Auction No. 23, the LMDS re-auction, began on April 27, 1999, and closed on May 12, 1999. (40 bidders won 161 licenses.)

million in the previous three calendar years.<sup>58</sup> Moreover, the Commission added an additional classification for a “very small business,” which was defined as an entity that had annual average gross revenues of less than \$15 million in the previous three calendar years.<sup>59</sup> These definitions of “small business” and “very small business” in the context of the LMDS auctions have been approved by the SBA.<sup>60</sup> In the first LMDS auction, 104 bidders won 864 licenses. Of the 104 auction winners, 93 claimed status as small or very small businesses. In the LMDS re-auction, 40 bidders won 161 licenses. Based on this information, we believe that the number of small LMDS licenses will include the 93 winning bidders in the first auction and the 40 winning bidders in the re-auction, for a total of 133 small entity LMDS providers as defined by the SBA and the Commission’s auction rules.

23. *Incumbent Local Exchange Carriers (LECs).* Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>61</sup> According to Commission data,<sup>62</sup> 1,307 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,307 carriers, an estimated 1,019 have 1,500 or fewer employees and 288 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses.

24. *Competitive Local Exchange Carriers, Competitive Access Providers (CAPs), “Shared-Tenant Service Providers,” and “Other Local Service Providers.”* Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees.<sup>63</sup> According to Commission data,<sup>64</sup> 859 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local

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<sup>58</sup> See *LMDS Order*, 12 FCC Rcd at 12545.

<sup>59</sup> *Id.*

<sup>60</sup> See Letter to Daniel Phythyon, Chief, Wireless Telecommunications Bureau (FCC) from A. Alvarez, Administrator, SBA (January 6, 1998).

<sup>61</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>62</sup> FCC, Wireline Competition Bureau, Industry Analysis and Technology Division, “Trends in Telephone Service” at Table 5.3, page 5-5 (Feb. 2007) (Trends in Telephone Service). This source uses data that are current as of October 20, 2005.

<sup>63</sup> 13 C.F.R. § 121.201, NAICS code 517110.

<sup>64</sup> Trends in Telephone Service at Table 5.3.



exchange carrier services. Of these 859 carriers, an estimated 741 have 1,500 or fewer employees and 118 have more than 1,500 employees. In addition, 16 carriers have reported that they are “Shared-Tenant Service Providers,” and all 16 are estimated to have 1,500 or fewer employees. In addition, 44 carriers have reported that they are “Other Local Service Providers.” Of the 44, an estimated 43 have 1,500 or fewer employees and one has more than 1,500 employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, “Shared-Tenant Service Providers,” and “Other Local Service Providers” are small entities.

25. *Retailers.* The rules adopted herein will apply only to retailers that choose to participate in the converter box coupon program. The SBA has developed a small business size standard for Radio, Television, and Other Electronics Stores, which is: all such firms having \$8 million or less in annual receipts.<sup>65</sup> The list of retailers who will be participating will not be finalized until March 2008,<sup>66</sup> but they will likely include dedicated consumer electronics stores and internet-based stores.

26. *Radio, Television, and Other Electronics Stores.* The Census Bureau defines this economic census category as follows: “This U.S. industry comprises: (1) establishments known as consumer electronics stores primarily engaged in retailing a general line of new consumer-type electronic products; (2) establishments specializing in retailing a single line of consumer-type electronic products (except computers); or (3) establishments primarily engaged in retailing these new electronic products in combination with repair services.”<sup>67</sup> The SBA has developed a small business size standard for Radio, Television, and Other Electronics Stores, which is: all such firms having \$8 million or less in annual receipts.<sup>68</sup> According to Census Bureau data for 2002, there were 10,380 firms in this category that operated for the entire year.<sup>69</sup> Of this total, 10,080 firms had annual sales of under \$5 million, and 177 firms had sales of \$5 million or more but less than \$10 million.<sup>70</sup> Thus, the majority of firms in this category can be considered small.

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<sup>65</sup> 13 C.F.R. § 121.201, NAICS code 443112.

<sup>66</sup> 47 C.F.R. § 301.6 (2007).

<sup>67</sup> U.S. Census Bureau, 2002 NAICS Definitions, “443112 Radio, Television, and Other Electronics Stores”; <http://www.census.gov/epcd/naics02/def/NDEF443.HTM>.

<sup>68</sup> 13 C.F.R. § 121.201, NAICS code 443112.

<sup>69</sup> U.S. Census Bureau, 2002 Economic Census, Industry Series: Retail Trade, Table 4, Sales Size of Firms for the United States: 2002, NAICS code 443112 (issued November 2005).

<sup>70</sup> *Id.* An additional 123 firms had annual sales of \$10 million or more. As a measure of small business prevalence, the data on annual sales are roughly equivalent to what one would expect from data on annual receipts.

27. *Electronic Shopping.* According to the Census Bureau, this economic census category “comprises establishments engaged in retailing all types of merchandise using the Internet.”<sup>71</sup> The SBA has developed a small business size standard for Electronic Shopping, which is: all such entities having \$23 million or less in annual receipts.<sup>72</sup> According to Census Bureau data for 2002, there were 4,959 firms in this category that operated for the entire year.<sup>73</sup> Of this total, 4,742 firms had annual sales of under \$10 million, and an additional 133 had sales of \$10 million to \$24,999,999.<sup>74</sup> Thus, the majority of firms in this category can be considered small.

28. *Electronics Equipment Manufacturers.* The rules adopted herein will apply to manufacturers of television receiving equipment and other types of consumer electronics equipment. The SBA has developed definitions of small entity for manufacturers of audio and video equipment<sup>75</sup> as well as radio and television broadcasting and wireless communications equipment.<sup>76</sup> These categories both include all such companies employing 750 or fewer employees. The Commission has not developed a definition of small entities applicable to manufacturers of electronic equipment used by consumers, as compared to industrial use by television licensees and related businesses. Therefore, we will utilize the SBA definitions applicable to manufacturers of audio and visual equipment and radio and television broadcasting and wireless communications equipment, since these are the two closest NAICS Codes applicable to the consumer electronics equipment manufacturing industry. However, these NAICS categories are broad and specific figures are not available as to how many of these establishments manufacture consumer equipment. According to the SBA’s regulations, an audio and visual equipment manufacturer must have 750 or fewer employees in order to qualify as a small business concern.<sup>77</sup> Census Bureau data indicates that there are 554 U.S. establishments that manufacture audio and visual equipment, and that 542 of these establishments have fewer than 500 employees and would be classified as small entities.<sup>78</sup> The remaining 12

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<sup>71</sup> U.S. Census Bureau, 2002 NAICS Definitions, “454111 Electronic Shopping”; <http://www.census.gov/epcd/naics02/def/NDEF454.HTM#N4541>.

<sup>72</sup> 13 C.F.R. § 121.201, NAICS code 454111.

<sup>73</sup> U.S. Census Bureau, 2002 Economic Census, Subject Series: Retail Trade, Table 4, “Sales Size of Firms for the United States: 2002,” NAICS code 454111 (issued Nov. 2005); <http://www.census.gov/prod/ec02/ec0244sssz.pdf>. As a measure of small business prevalence, the data on annual sales are roughly equivalent to what one would expect from data on annual receipts.

<sup>74</sup> *Id.* An additional 84 firms had annual sales of \$25 million or more.

<sup>75</sup> 13 CFR § 121.201, NAICS Code 334310.

<sup>76</sup> 13 CFR § 121.201, NAICS Code 334220.

<sup>77</sup> 13 CFR § 121.201, NAICS Code 334310.

<sup>78</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Industry Series - Manufacturing, Audio and Video Equipment Manufacturing, Table 4 at 9 (1999). The amount of 500 employees was used to estimate the number of small business firms because the relevant Census categories stopped at 499 employees and began at 500 employees. (continued....)

establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. Under the SBA's regulations, a radio and television broadcasting and wireless communications equipment manufacturer must also have 750 or fewer employees in order to qualify as a small business concern.<sup>79</sup> Census Bureau data indicates that there 1,215 U.S. establishments that manufacture radio and television broadcasting and wireless communications equipment, and that 1,150 of these establishments have fewer than 500 employees and would be classified as small entities.<sup>80</sup> The remaining 65 establishments have 500 or more employees; however, we are unable to determine how many of those have fewer than 750 employees and therefore, also qualify as small entities under the SBA definition. We, therefore, conclude that there are no more than 542 small manufacturers of audio and visual electronics equipment and no more than 1,150 small manufacturers of radio and television broadcasting and wireless communications equipment for consumer/household use.

**D. Description of Projected Reporting, Record Keeping, and Other Compliance Requirements for Small Entities**

29. The rules adopted by this *Report and Order* impose reporting, recordkeeping and other compliance requirements on small entities. The *Report and Order* establishes rules requiring industry to participate in a coordinated, nationwide, consumer outreach campaign, and does not create alternative requirements for small entities. Some elements of the *Report and Order* are voluntary, applying, for instance, only to DTV.gov Transition Partners or participants in the NTIA Converter Box Coupon Program. The mandatory requirements vary for different sectors of the telecommunications industry.<sup>81</sup>

**E. Steps Taken to Minimize Significant Impact on Small Entities, and Significant Alternatives Considered**

30. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives (among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or

(Continued from previous page) \_\_\_\_\_

No category for 750 employees existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>79</sup> 13 CFR § 121.201, NAICS Code 334220.

<sup>80</sup> Economics and Statistics Administration, Bureau of Census, U.S. Department of Commerce, 1997 Economic Census, Industry Series - Manufacturing, Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing, Table 4 at 9 (1999). The amount of 500 employees was used to estimate the number of small business firms because the relevant Census categories stopped at 499 employees and began at 500 employees. No category for 750 employees existed. Thus, the number is as accurate as it is possible to calculate with the available information.

<sup>81</sup> See paragraph 10, *supra*.

simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.<sup>82</sup>

31. The National Association of Broadcasters has expressed its intention to make informative PSAs available to all broadcasters, even non-members, which will reduce the cost burden of the requirement to air them. Also, the mandatory broadcaster filing does not require a specialized form or extensive information gathering. Most importantly, although these requirements will impose some costs on small broadcasters, they will also ensure that small broadcasters continue to retain their audiences after the transition by fully informing viewers of the steps necessary to keep watching. Small broadcasters rely completely on their viewing audience for their revenue stream, so this benefit should far outweigh any costs for this temporary requirement.

32. Small MVPDs will have costs for printing “bill stuffer” transition notices to include with their bills and bill notices. These costs can be somewhat ameliorated by the use of electronic and automatic billing, and the transition education campaign could potentially result in an increase of MVPD subscriptions from over-the-air subscribers and increased equipment rentals from current subscribers who wish to extend service to all of their televisions prior to the transition. Furthermore, MVPDs will have an additional 30 days to prepare for notice distribution. The costs for small MVPDs will therefore, likely not be significant.

33. The costs of reporting outreach efforts to the Commission by the winners of the 700 MHz auction will be *de minimis*, consisting solely of narrative reports in a flexible format describing outreach efforts the winner has chosen to make. On the other hand, small manufacturers of television receivers and related equipment, and small providers of telecommunications services to low-income households, will have costs to produce and distribute transition notices to their customers and subscribers, although ETCs will have an additional 30 days to prepare for notice distribution. These costs will not be any greater for small than for large companies, however. The very limited nature of the notification requirements for both groups mean that no lighter burden could be placed on small entities without essentially eliminating the benefit to consumers of a comprehensive transition education campaign.

## **F. Report to Congress**

34. The Commission will send a copy of the Report and Order, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review

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<sup>82</sup> 5 U.S.C. § 603(c)(1) – (c)(4)

Act.<sup>83</sup> In addition, the Commission will send a copy of the Report and Order, including this FRFA, to the Chief Counsel for Advocacy of the SBA. A copy of the Report and Order and FRFA (or summaries thereof) will also be published in the Federal Register.<sup>84</sup>

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<sup>83</sup> See 5 U.S.C. § 801(a)(1)(A).

<sup>84</sup> See 5 U.S.C. § 604(b).

## APPENDIX B

Amended Rules<sup>1</sup>

Parts 15, 27, 54, 73, and 76 of Title 47 of the Code of Federal Regulations are amended as follows:

## Part 15 – Radio Frequency Devices

## 1. The authority citation for Part 15 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 302a, 303, 304, 307, 336, and 544a.

## 2. Section 15.124 is added and reads as follows:

**§ 15.124 DTV Transition Notices by Manufacturers of Televisions and Related Devices**

(a) The requirements of this section shall apply to television receivers and related devices. Related devices are electronic devices that are designed to be connected to, and operate with, television receivers, and which include, but are not limited to, DVD players and recorders, VCRs and monitors, set-top-boxes (including NTIA Coupon Eligible Digital-to-Analog Converter Boxes), and personal video recorders.

(b) Television receivers and related devices shipped between the effective date of these rules and March 31, 2009 must include notices about the digital television (DTV) transition. These notices must:

(1) Be in clear and conspicuous print;

(2) Convey at least the following information about the DTV transition:

(i) After February 17, 2009, a television receiver with only an analog broadcast tuner will require a converter box to receive full power over-the-air broadcasts with an antenna because of the Nation's transition to digital broadcasting. Analog-only TVs should continue to work as before to receive low power, Class A or translator television stations and with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products.

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<sup>1</sup> Changes are indicated in **bold**.

(ii) Information about the DTV transition is available from [www.DTV.gov](http://www.DTV.gov) or this manufacturer at [telephone number], and from [www.dtv2009.gov](http://www.dtv2009.gov) or 1-888-DTV-2009 for information about subsidized coupons for digital-to-analog converter boxes; and

(3) Explain clearly what effect, if any, the DTV transition will have on the use of the receiver or related device, including any limitations or requirements associated with connecting a related device to a DTV receiver.

(c) Parties that manufacture, import, or ship interstate television receivers and related devices are responsible for inclusion of these notices.

#### Part 27 – Miscellaneous Wireless Communications Services

1. The authority citation for Part 27 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 301, 302, 303, 307, 309, 332, 336, and 337 unless otherwise noted.

2. Section 27.20 is added and reads as follows:

#### § 27.20 Digital Television Transition Education Reports

(a) The requirements of this section shall apply only with regard to WCS license authorizations in Block A in the 698–704 MHz and 728–734 MHz bands, Block B in the 704–710 MHz and 734–740 MHz bands, Block E in the 722–728 MHz band, Block C, C1, or C2 in the 746–757 MHz and 776–787 MHz bands, and Block D in the 758–763 MHz and 788–793 MHz bands.

(b) By the tenth day of the first calendar quarter after the initial grant of a WCS license authorization subject to the requirements of this section – and on a quarterly basis thereafter as specified in subsection (c) – the licensee holding such authorization must file a report with the Commission indicating whether, in the previous quarter, it has taken any outreach efforts to educate consumers about the transition from analog broadcast television service to digital broadcast television service (DTV) and, if so, what specific efforts were undertaken. Thus, for example, if the license authorization is granted during the April-June quarter of 2008, the licensee must file its first report by July 10, 2008. Each quarterly report, either paper or electronic, must be filed with the Commission in Docket Number 07-148. If the quarterly report is a paper filing, the cover sheet must clearly state “Report,” whereas if the report is filed electronically using the Commission’s Electronic Comment File System (ECFS), the “Document Type” on the cover sheet should indicate “REPORT.”

(c) The reporting requirements under this section cover the remaining period of the DTV transition. Accordingly, once the licensee files its quarterly report covering the first quarter of 2009, the requirements of this section terminate.

Part 54 – Universal Service

1. The authority citation for Part 54 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 154(i), 201, 205, 214, and 254 unless otherwise noted.

2. Section 54.418 is added and reads as follows:

**§ 54.418 Digital Television Transition Notices by Eligible Telecommunications Carriers**

(a) Eligible telecommunications carriers (ETCs) that receive federal universal service funds shall provide their Lifeline or Link-Up customers with notices about the transition for over-the-air full power broadcasting from analog to digital service (the “DTV Transition”) in the monthly bills or bill notices received by such customers beginning 30 days after the effective date of these rules, and concluding in March 2009.

(b) The notice must be provided as part of an information section on the bill or bill notice itself or on a secondary document mailed with the bill or bill notice, in the same language or languages as the bill or bill notice. These notices must:

(1) Be in clear and conspicuous print;

(2) Convey at least the following information about the DTV transition:

(i) After February 17, 2009, a television receiver with only an analog broadcast tuner will require a converter box to receive full power over-the-air broadcasts with an antenna because of the Nation’s transition to digital broadcasting. Analog-only TVs should continue to work as before to receive low power, Class A or translator television stations and with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products.

(ii) Information about the DTV transition is available from [www.DTV.gov](http://www.DTV.gov), and from [www.dtv2009.gov](http://www.dtv2009.gov) or 1-888-DTV-2009 for information about subsidized coupons for digital-to-analog converter boxes;

(d) If an ETC’s Lifeline or Link-Up customer does not receive paper versions of either a bill or a notice of billing, then that customer must be provided with



equivalent monthly notices in whatever medium they receive information about their monthly bill.

(e) ETCs that receive federal universal service funds shall provide information on the DTV Transition that is equivalent to the information provided pursuant to paragraph (b)(2) of this section as part of any Lifeline or Link-Up publicity campaigns conducted by the ETC between the effective date of these rules and March 31, 2009.

#### Part 73 – Radio Broadcast Services

1. The authority citation for Part 73 continues to read as follows:

AUTHORITY: 47 U.S.C. 154, 303, 334, 336.

2. Section 73.674 is added and reads as follows:

#### § 73.674 Digital Television Transition Notices by Broadcasters

(a) Each full-power commercial and noncommercial educational television broadcast station licensee or permittee must air an educational campaign about the transition from analog broadcasting to digital television (DTV). For each such commercial station, a licensee or permittee must elect, by the effective date of these rules, to comply with either paragraph (c) or (d) of this Section. For each such noncommercial station, a licensee or permittee must elect, by the effective date of these rules, to comply with paragraph (c), (d), or (e) of this Section. A licensee or permittee must note their election via the filing of Form 388 as required by Section 73.3526 and 73.3527 of this Part.

(b) The following requirements apply to paragraphs (c), (d), and (e):

1. The station must comply with the requirements of the paragraph it elects with respect to its analog channel and its primary digital stream.
  - (1) Any Public Service Announcement aired to comply with these requirements must be closed-captioned, notwithstanding Section 79.1(d)(6) of this chapter.
  - (2) The campaign must begin no later than the effective date of these rules and continue at least through March 31, 2009. After March 31, 2009, any station that has filed a request for an extension to serve its full operating area or is operating under such an extension must continue its education campaign until the request is withdrawn or denied or, if granted, until it expires.

(c) Consumer Education Campaign Option One

- (1) From the effective date of these rules through March 31, 2008, a licensee or permittee must, at a minimum, air one transition-related public service announcement (PSA), and one transition-related informative text crawl, in every quarter of every broadcast day. This minimum will increase to two of each, per quarter, from April 1, 2008 through September 30, 2008, and to three of each, per quarter, from October 1, 2008 through the conclusion of the campaign. At least one PSA and one informative text crawl per day must be aired between 8:00 pm and 11:00 pm in the Eastern and Pacific time zones, and between 7:00 pm and 10:00 pm in the Mountain and Central time zones.
- (2) For the purposes of this section, each broadcast day consists of four quarters; 6:01 am to 12:00 pm, 12:01 pm to 6:00 pm, 6:01 pm to 12:00 am, and 12:01 am to 6 am.
- (3) Informative text crawls must:
  - (i) Air during programming;
  - (ii) Air for no fewer than 60 consecutive seconds;
  - (iii) Be displayed so that the text travels across the bottom or top of the viewing area at the same speed used for other informative text crawls concerning news, sports, and entertainment information;
  - (iv) Be presented in the same language as a majority of the programming carried by the station;
  - (v) Be displayed so that they do not block and are not blocked by closed-captioning or emergency information; and
  - (vi) Contain at least the following information, but may contain more, provided they contain no misleading or inaccurate statements:
    - (A) After February 17, 2009, a television receiver with only an analog broadcast tuner will require a converter box to receive full power over-the-air broadcasts with an antenna because of the Nation's transition to digital broadcasting. Analog-only TVs should continue to work

as before to receive low power, Class A or translator television stations and with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products.

- (B) More information is available by phone and online, and provide appropriate contact information, including means of contacting the station or the network.

(4) Public service announcements must have a duration of no fewer than 15 consecutive seconds, and contain, at a minimum, the information described in Paragraph (c)(3)(vi) of this section. They must also address the following topics at least once each during every calendar week:

- (i) The steps necessary for an over-the-air viewer or a subscriber to a multichannel video programming distributor to continue viewing the station after the transition;
- (ii) Changes in the geographic area or population served by the station during or after the transition;
- (iii) The channel on which the station can be viewed after the transition;
- (iv) Whether the station will be providing multiple streams of free video programming during or after the transition;
- (v) Whether the station will be providing a High Definition signal during or after the transition;
- (vi) The exact date and time that the station will cease analog broadcasting, if it has not already done so; and
- (vii) The exact date and time that the station will begin digital broadcasting on its post-transition channel, if it has not already done so.

(d) Consumer Education Campaign Option Two

- (1) A licensee or permittee must, at a minimum, air an average of sixteen transition-related PSAs per week, and an average of sixteen transition-related crawls, snipes, and/or tickers per week, over a calendar quarter.

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- (2) For the purposes of calculating the average number of PSAs aired, a 30-second PSA qualifies as a single PSA, and two 15-second PSAs count as a single PSA.
  - (3) PSAs, crawls, snipes, and/or tickers aired between the hours of 1:00 am and 5:00 am do not conform to the requirements of this section and will not count toward calculating the average number of transition-related education pieces aired.
  - (4) Over the course of each calendar quarter, 25 percent of all PSAs, and 25 percent of all crawls, snipes, and/or tickers, must air between 6:00 pm and 11:35 pm (Eastern and Pacific time zones) or between 5:00 pm and 10:35 pm (Central and Mountain time zones).
  - (5) Stations must also air a 30-minute informational program on the digital television (DTV) transition between 8 am – 11:35 pm on at least one day prior to February 17, 2009.
  - (6) Beginning on November 10, 2008, all stations will begin a 100-Day Countdown to the transition. During this period, each station must air at least one of the following per day:
    - (i) *Graphic Display.* A graphic super-imposed during programming content that reminds viewers graphically there are “x number of days” until the transition. They will be visually instructed to call a toll-free number and/or visit a Website for details. The length of time will vary from 5 to 15 seconds, at the discretion of the station.
    - (ii) *Animated Graphic.* A moving or animated graphic that ends up as a countdown reminder. It would remind viewers that there are “x number of days” until the transition. They will be visually instructed to call a toll-free number and/or visit a Website for details. The length of time will vary from 5 to 15 seconds, at the discretion of the station.
    - (iii) *Graphic and Audio Display.* Option #1 or option #2 with an added audio component. The length of time will vary from 5 to 15 seconds, at the discretion of the station.
    - (iv) *Longer Form Reminders.* Stations can choose from a variety of longer form options to communicate the countdown message. Examples might include an “Ask the Expert” segment where viewers can call in to a phone bank and ask knowledgeable

people their questions about the transition.<sup>2</sup> The length of these segments will vary from 2 minutes to 5 minutes, at the discretion of the station (Some stations may also choose to include during newscasts DTV “experts” who may be asked questions by the anchor or reporter about the impending February 17, 2009 deadline).

(e) Consumer Education Campaign Option Three

- (1) Only a licensee or permittee of a noncommercial television station may elect this option. Under this option, from the effective date of these rules, through April 30, 2008, a noncommercial broadcaster must, at a minimum, air 60 seconds per day of transition-related education (PSAs), in variable timeslots, including at least 7.5 minutes per month between 6 pm and 12 am. From May 1, 2008, through October 31, 2008, a broadcaster must, at a minimum, air 120 seconds per day of transition-related education (PSAs), in variable timeslots, including at least 15 minutes per month between 6 pm and 12 am. From November 1, 2008, through March 31, 2009, a broadcaster must, at a minimum, air 180 seconds per day of transition-related education (PSAs), in variable timeslots, including at least 22.5 minutes per month between 6 pm and midnight.
- (2) Noncommercial stations must also air a 30-minute informational program on the digital television (DTV) transition between 8 am – 11:35 pm on at least one day prior to February 17, 2009.

3. Section 73.3526 is revised to read as follows:

§ 73.3526 Local Public Inspection File of Commercial Stations

\* \* \* \* \*

(e) *Contents of the file.*

\* \* \* \* \*

(11)(iv) *DTV Transition Education Reports.* For full-power commercial TV broadcast stations, both analog and digital, on a quarterly basis, a completed Form 388, DTV

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<sup>2</sup> NAB states that “This has been successfully used by medical doctors who are often called on during the flu season, post-traumatic events or other local health related concerns. Adding the “expert” ensures people instinctively know they can rely on the advice and action suggested by the expert.” NAB Ex Parte of February 11, 2008.

Consumer Education Quarterly Activity Report. The Report for each quarter is to be placed in the public inspection file by the tenth day of the succeeding calendar quarter. By this date, a copy of the Report for each quarter must be filed electronically with the Commission in Docket Number 07-148 using the Commission's Electronic Comment File System (ECFS). The "Document Type" on the cover sheet must indicate "REPORT." Stations electing to conform to the requirements of Section 73.674(b) must also provide the form on the station's public website, if such exists. The Report shall be separated from other materials in the public inspection file. The first Report, covering the first quarter of 2008, must be filed no later than April 10, 2008. The Reports must continue to be included up to and including the quarter in which a station concludes its education campaign. These Reports shall be retained in the public inspection file for one year. Licensees and permittees shall publicize in an appropriate manner the existence and location of these Reports.

4. Section 73.3527 is revised to read as follows:

§ 73.3527 Local Public Inspection File of Noncommercial Educational Stations

\* \* \* \* \*

(e) *Contents of the file.*

\* \* \* \* \*

(13) *DTV Transition Education Reports.* For full-power noncommercial educational TV broadcast stations, both analog and digital, on a quarterly basis, a completed Form 388, DTV Consumer Education Quarterly Activity Report. The Report for each quarter is to be placed in the public inspection file by the tenth day of the succeeding calendar quarter. By this date, a copy of the Report for each quarter must be filed electronically with the Commission in Docket Number 07-148 using the Commission's Electronic Comment File System (ECFS). The "Document Type" on the cover sheet must indicate "REPORT." Stations electing to conform to the requirements of Section 73.674(b) must also provide the form on the station's public website, if such exists. The Report shall be separated from other materials in the public inspection file. The first Report, covering the first quarter of 2008, must be filed no later than April 10, 2008. The Reports must continue to be included up to and including the quarter in which a station concludes its education campaign. These Reports shall be retained in the public inspection file for one year. Licensees and permittees shall publicize in an appropriate manner the existence and location of these Reports.

1. The authority citation for Part 76 continues to read as follows:

AUTHORITY: 47 U.S.C. 151, 152, 153, 154, 301, 302, 303, 303a, 307, 308, 309, 312, 315, 317, 325, 336, 339, 503, 521, 522, 531, 532, 533, 534, 535, 536, 537, 543, 544, 544a, 545, 548, 549, 552, 554, 556, 558, 560, 561, 571, 572, 573.

2. Section 76.1630 is added and reads as follows:

§ 76.1630 MVPD Digital Television Transition Notices

(a) Multichannel video programming distributors (MVPDs) shall provide subscribers with notices about the transition for over-the-air full power broadcasting from analog to digital service (the “DTV Transition”) in the monthly bills or bill notices received by subscribers beginning 30 days after the effective date of these rules and concluding in March, 2009.

(b) The notice must be provided as part of an information section on the bill or bill notice itself or on a secondary document mailed with the bill or bill notice, in the same language or languages as the bill or bill notice. These notices must:

(1) Be in clear and conspicuous print;

(2) Convey at least the following information about the DTV transition:

(i) After February 17, 2009, a television receiver with only an analog broadcast tuner will require a converter box to receive full power over-the-air broadcasts with an antenna because of the Nation’s transition to digital broadcasting. Analog-only TVs should continue to work as before to receive low power, Class A or translator television stations and with cable and satellite TV services, gaming consoles, VCRs, DVD players, and similar products.

(ii) Information about the DTV transition is available from [www.DTV.gov](http://www.DTV.gov) or this MVPD at [telephone number and website if available], and from [www.dtv2009.gov](http://www.dtv2009.gov) or 1-888-DTV-2009 for information about subsidized coupons for digital-to-analog converter boxes;

(3) and explain clearly what effect, if any, the DTV Transition will have on the subscriber’s access to MVPD service. It must also note that analog sets not connected to an MVPD service may need additional equipment (i.e. converter box) or may have to be replaced.

(c) To the extent that a given customer does not receive paper versions of either a bill or a notice of billing, that customer must be provided with equivalent monthly notices in whatever medium they receive information about their monthly bill.



## APPENDIX C

## DTV Consumer Education Quarterly Activity Report

**Instructions**

This form should be used to provide the Federal Communications Commission (FCC) with information pertaining to all station activity to educate consumers on the transition to digital television (DTV). All stations should log DTV Transition-Related Public Service Announcements (PSAs) and other DTV activities using the appropriate house (identification) numbers. These logs or records should include the date and time that each DTV activity occurred. This form must be filed in Docket Number 07-148 as Document Type: REPORT, and placed in the station's Public Inspection File. This form must continue to be filed for each quarter in which a station has DTV Transition education obligations.

**Station Call Sign(s)**

\_\_\_\_\_

Report reflects information for quarter ending (mm/dd/yy)

0	3	3	1	0	8

Have you opted to comply with Option One, Two, or Three (once elected, this choice may not change)?

☒ Option One (A and D) ☐ Option Two (B and L) ☐ Option Three (C and D)

Over the past quarter, have you fully complied with the requirements of this option?

☒ Yes ☐ No

**Simulcasting**

Are you simulcasting on your Analog channel and your primary Digital stream?

☐ Yes ☒ No

If **YES**, complete only one form for both. If **NO**, complete a form for your Analog channel and a second for your primary Digital stream.

Call Sign	Channel Numbers	Community of License			
		City	State	County	Zip
	Analog _____	Code			

	Digital _____										
Licensee											
Above, circle the Channel Number(s) to which this form applies.		Nielsen DMA	World Wide Web Home Page Address								
Facility ID Number	Previous Call Sign (if applicable)	License Renewal Expiration Date (mm/dd/yy) <table border="1"><tr><td></td><td></td><td></td><td></td><td></td><td></td></tr></table>									

**Section A (For broadcasters electing Option One)**

Stations that elect Option One must place a copy of this form on the station's public website, if such exists.

On its analog channel, and its primary digital stream, a station must air one transition PSA, and run one transition crawl, in every quarter of every day. This requirement will increase to two PSAs and crawls per quarter per day on April 1, 2008, and to three of each on October 1, 2008. Stations are required to air PSAs or crawls at various times in any given day part, and at least one PSA and one crawl per day must be run during primetime hours. On-air education must not contain inaccurate or misleading statements and must be provided in the same language as a majority of the programming carried by the station. PSAs must be at least 15 seconds, and closed-captioned. Crawls must run during programming for no fewer than 60 consecutive seconds across the bottom or top of the viewing area (See rules for additional details).

Have you aired a sufficient number of eligible PSAs (28, 56, or 84 per week, depending on the reporting period) during the correct quarters of the day?

☒

Yes

☐

No

Have you aired a sufficient number of eligible crawls (28, 56, or 84 per week, depending on the reporting period) during the correct quarters of the day?

☒

Yes

☐

No

**Section B (For broadcasters electing Option Two)**

On its analog channel, and its primary digital stream, a station must run an average of 16 transition-related PSAs and 16 transition-related crawls, snipes, and/or tickers per week in each quarter, all between the hours of 5 a.m. and 1 a.m. . It must also run one 30 minute DTV-related informational program once, and one 100-Day Countdown piece per day for the 100 days prior to the conclusion of the transition. Comment boxes **MUST** be used to describe these compliant activities (See rules for additional details).

**Total Number of Eligible DTV Transition-Related PSAs and Crawls, Snipes, and/or Tickers (CSTs) Run -- Last Quarter**

How many DTV PSAs and CSTs did your station run between 5:00 a.m. and 1:00 a.m. last quarter?

Total 5:00 a.m. to 1:00 a.m. PSAs

2

Total 5:00 a.m. to 1:00 a.m. CSTs

2

For informational purposes only, how many DTV PSAs and CSTs did your station run in the last quarter from 6:00 a.m. to 9:00 a.m.?

Total 6:00 a.m. to 9:00 a.m. PSAs

1

Total 6:00 a.m. to 9:00 a.m. CSTs

0

For stations located in the Eastern or Pacific Time Zone, how many DTV PSAs and CSTs did your station run in the last quarter from 6:00 p.m. to 11:35 p.m. (must average at least 4 per week)?

Total 6:00 p.m. to 11:35 p.m. PSAs

1

Total 6:00 p.m. to 11:35 p.m. CSTs

2

For stations located in the Central or Mountain Time Zone, how many DTV PSAs and CSTs did your station run in the last quarter from 5:00 p.m. to 10:35 p.m. (must average at least 4 per week)?

Total 5:00 p.m. to 10:35 p.m. PSAs

1

Total 5:00 p.m. to 10:35 p.m. CSTs

Comments (add additional sheets where necessary):  
  
  
  
  
  
  
  
  
  
**30 Minute Educational Programs – Last Quarter**

How many 30 minute, DTV-related informational programs did your station run during the quarter? At least one such program must be run between the hours of 8:00 a.m. and 11:35 p.m., prior to February 17, 2009.

Total number of 30 Minute Informational Programs

Comments (add additional sheets where necessary):  
  
  
  
  
  
  
  
  
  
**100-Day Countdown Eligible Pieces – Last Quarter**

Beginning on November 10, 2008, all stations participating in Option Two will engage in special 100-Day “Countdown to DTV” activities. Stations must execute a minimum of one “Countdown to DTV” on-air activity per day during the 100 days leading up to February 17, 2009. During the last quarter, how many of each eligible 100-Day “Countdown to DTV” pieces did your station run?

☒ *Graphic Displays (displayed on website – countdown)*☐ *Animated Graphics*☐ *Graphic and Audio Displays*☐ *Longer Form Reminders*Comments (add additional sheets where necessary):



**Section C (For Noncommercial broadcasters only)**

On its analog channel, and its primary digital stream, a station must air 60 seconds per day of on-air consumer education, in variable timeslots, including at least 7.5 minutes per month between 6 pm and 12 am. Beginning May 1, 2008, this requirement doubles, and beginning November 1, 2008, it increases again, to 180 seconds per day and 22.5 minutes per month between 6 pm and midnight. It must also run one 30 minute transition education piece once (See rules for additional details).

Have you aired a sufficient amount of consumer education (60, 120, or 180 seconds per day, depending on the date) during each day this quarter?

☐

Yes

☐

No

**30 Minute Educational Programs – Last Quarter**

How many 30 minute, DTV-related informational programs did your station run during the quarter? The comment box may be used to describe this activity. At least one such program must be run between the hours of 8:00 a.m. and 11:35 p.m., prior to February 17, 2009.

Total number of 30 Minute Informational Programs

Comments (add additional sheets where necessary):

**Section D (For all broadcasters)****Additional DTV On-air Initiatives – Last Quarter**

Did your station run additional on-air initiatives (such as news reports, town hall meetings, etc.) during the quarter? The comment box may be used to describe these initiatives.

☐ Yes ☒ No

Comments(add additional sheets where necessary):

**Station Web Site Additional Activity Related to the DTV Transition – Last Quarter**

Does your station have a Web site ☒ ☐ No

If YES, did your station provide additional DTV related information or activities on that Web site? The comment box may be used to describe what was posted on the station's Web site.

☒ Yes ☐ No

Comments(add additional sheets where necessary):

- Countdown graphic at top of website
- DTV Informational Link on website

**Additional DTV Outreach Efforts -- Last Quarter**

Check all of the DTV related activities listed below that your station engaged in over the last quarter. The comment box may be used to describe this activity.

☐ Speaking Engagements

Comments(add additional sheets where necessary):

☐ Community Events

Comments(add additional sheets where necessary):

☐ Other (describe)

Comments(add additional sheets where necessary):



**This comment box may be used to include other comments or information about your station's DTV activity over the last quarter.**

Comments(add additional sheets where necessary):

### **STATION CERTIFICATION**

**I certify that the statements in this document are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.**

Name of Licensee (print):

Signature:

Date:

## APPENDIX D

Letter from the Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce, and the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives, to the Honorable Kevin J. Martin, Chairman, the Honorable Michael J. Copps, Commissioner, the Honorable Jonathan S. Adelstein, Commissioner, the Honorable Deborah Taylor Tate, Commissioner, and the Honorable Robert M. McDowell, Commissioner, Federal Communications Commission. (attached)

## APPENDIX E

Reply from the Honorable Kevin J. Martin, Chairman, Federal Communications Commission, to the Honorable John D. Dingell, Chairman of the Committee on Energy and Commerce, and the Honorable Edward J. Markey, Chairman of the Subcommittee on Telecommunications and the Internet, U.S. House of Representatives. (attached)



**STATEMENT OF  
CHAIRMAN KEVIN J. MARTIN**

*Re: DTV Consumer Education Initiative, MB Docket No. 07-148*

One of the Commission's top priorities is to do everything in its power to facilitate a successful DTV transition. Ensuring that no Americans are left in the dark after February 17, 2009 is an enormous undertaking. Significantly, it is one which no single entity, public or private, can achieve alone. Rather, it requires the commitment and cooperation of government, industry, and consumer groups. It is the Commission's responsibility to ensure these parties fulfill their commitments in a correct, clear, and consistent manner. Today's item requires various entities – television broadcasters, multichannel video programming distributors (MVPDs), manufacturers, retailers, and telecommunications carriers – to come together and do their part to promote consumer awareness about the transition and how to prepare for it.

I am pleased that many of these industry groups have already initiated public awareness campaigns and the order we adopt today gives them the flexibility to continue these efforts. By working together, and using such tools as public service announcements, screen crawls, and notifications in monthly bills, we will be able to reach as broad an audience as possible, including those segments of the population that are hard to reach including, senior citizens, non-English speaking and minority communities, people with disabilities, low-income individuals, and people living in rural and tribal areas.

The Commission will continue to take whatever actions are necessary to minimize the potential burden the digital transition could impose on consumers and maximize their ability to benefit from it. The next 12 months will undoubtedly be challenging. Nevertheless, it is my hope that through the combined efforts of government, industry and advocacy groups American consumers will reap the rewards that the digital transition has to offer.

**CONCURRING STATEMENT OF  
COMMISSIONER MICHAEL J. COPPS**

*Re: DTV Consumer Education Initiative, MB Docket No. 07-148*

Today's Order finally adopts many of the suggestions made nine months ago by Chairmen Dingell and Markey regarding steps the Commission could take on its own authority to compel industry DTV consumer education efforts. Unfortunately, one of the most important steps is not something the Commission can compel—the establishment of a federal Inter-Agency Task Force to oversee and coordinate the government's efforts. That is why Chairman Inouye and Chairman Dingell's recent call for the White House to establish just such a Task Force is so critical. We need accountability and clear lines of authority, both among federal agencies and in government's dealings with industry. That was the way the "Y2K" problem was addressed leading up to 2000. I actively participated in those efforts as Assistant Secretary of Commerce—I know what a coordinated, well-organized and effective national effort looks like. It doesn't look like this.

This transition actually requires more of individual consumers than did Y2K. The DTV transition requires millions of households (no one really knows how many) to take significant action prior to the transition date. Consumers must not only become aware of the transition; they have to understand whether and how it affects them, decide among various course of action, take affirmative steps such as applying for government coupons and purchasing a converter box, and physically install the new equipment and make it work. These challenges are compounded by the fact that many of the consumers most affected by the transition may be harder to reach or less technically savvy. Our efforts must be designed to reach the most vulnerable. If we happen to over-inform some consumers in the process, it is a small price to pay. We will never get this exactly right. We can either do too little or do too much. If we are smart, we will err on the side of doing too much.

The other thing we must do is tell consumers the truth. The American people do not want their information sugar-coated by marketing consultants or hedged into obscurity by cautious lawyers. They want it straight, and they will forgive anything other than being lulled into a false sense that the transition will be less disruptive than it turns out to be.

I wish today's item gave me more comfort that we are doing everything we can to prepare the American people for the approaching deadline. As I've said before, the best way to reach analog television viewers is through analog television programming. Broadcasters' on-air efforts are thus the linchpin of a successful transition.

Which brings me to the National Association of Broadcasters' "safe harbor" proposal. The premise of this proposal is that the Commission should step back and let the experts handle it. The NAB cites its extensive marketing experience as well as its hiring of Starcom MediaVest Group to help develop a plan "to engage consumers across numerous media elements." Starcom evaluated the DTV campaign using its exclusive "state-of-the-art television optimizer" named Tardiis, which "harnesses the power of viewing at the program level to provide optimized schedules for individual brands, as well as allocating programs across multiple products." The end result, according to NAB, is that "we will generate public awareness of the DTV transition in the form of over 132 billion impressions."

I readily admit that much of this marketing jargon is Greek to me. I would not know a state-of-the-art television optimizer if I tripped over one. But I am concerned about the apparent focus on creating consumer awareness through billions of "impressions." The goal is not simply to bombard consumers with ephemeral "impressions" about the transition, but to get consumers to *act* in ways that many will find confusing, disruptive and daunting. Indeed, a recent survey by the *Consumer Reports National Research Center* found that even among the growing number of consumers who are aware of the transition, 74% still have "major misconceptions" about the how the conversion will affect them. In other words, in order for the transition to succeed, awareness must be followed by understanding, planning and, ultimately, effective action. I can only hope that the implementation of the NAB plan will reflect the true scope of the task before us.

I know that many broadcasters are working diligently on the DTV transition. They are expending money and human resources to make it happen. But good intentions won't get us from here to there, nor will spending money in helter-skelter fashion. A national challenge of this magnitude requires cooperation and coordination. Some broadcasters have told me that, yes, they are launching consumer education programs but, no, they haven't coordinated their efforts with other stations in their market. That's a recipe for continued confusion and for leaving some consumers behind. So I continue to believe that a coordinated, private sector-public sector partnership is absolutely essential—it may just be our last best hope for something resembling a smooth DTV transition.

I concur to get some action started. But I limit myself to concurrence for want of what is truly needed.

**STATEMENT OF  
COMMISSIONER JONATHAN S. ADELSTEIN  
APPROVING IN PART, DISSENTING IN PART**

*Re: DTV Consumer Education Initiative, MB Docket No. 07-148*

This *Order* is long overdue.

After much delay, the Commission is finally adopting measures to ensure that Americans are aware of the DTV transition. I support this item because it is a critical *first* step towards developing a comprehensive consumer education plan – an essential part of the broader DTV transition effort that has sorely lacked focus, leadership and coordination. I am also pleased Chairman Martin has agreed to implement my proposal to reconstitute the Commission’s intra-agency DTV task force that was improvidently dismantled some time ago. We should now act on another one of my proposals – a federal government-wide, inter-agency task force.<sup>1</sup>

With disappointment, I dissent in part from this item because the majority of my colleagues have refused to agree to prepare a DTV transition report to Congress and the American people with a detailed plan to reach *and* assist at-risk, over-the-air reliant communities. The Commission’s unwillingness to prepare such a report ignores sound management practices, snubs the recommendations of objective expert observers, and, frankly, defies common sense. It perpetuates uncertainty at a time when everyone needs to know and help execute the game-plan. The quarterback needs to let other players know the play to execute; that’s the only way this nation will win on February 17, 2009.

Unfortunately, the Commission’s refusal to prepare a DTV report to Congress is the latest illustration of its stubborn unwillingness to be proactive and to mitigate risks associated with the transition. While oversight hearings and letters

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<sup>1</sup> For nearly two years, I have repeatedly called on the FCC and the NTIA to take leadership in creating an *inter*-agency task force. See Keynote Address of Jonathan S. Adelstein, Commissioner, FCC, “I Want My DTV: Building a National DTV Consumer Education Campaign,” Entertainment Technology Policy Summit, Consumer Electronics Association (March 15, 2006), at p. 4. [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-264354A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-264354A1.pdf).

Congressional leaders from both political parties have made similar requests, leading to the extraordinary step by Senate Chairman Inouye and House Chairman Dingell to send a letter to the President urging the creation a federal inter-agency task force.



from Congress have certainly made us much more engaged, congressional prodding is not a substitute for Commission planning and leadership.

The Commission's passive, *reactive* approach has had real consequences on the DTV transition. It has unnecessarily made the daunting task of executing an under-funded, national transition even more difficult. For example, the lack of an analog pass-through feature in the vast majority of the digital-to-analog converter boxes available to consumers could have been avoided. The Commission – the federal agency with a most talented, skilled staff of experts in communications – should have engaged the National Telecommunication Information Administration (NTIA) and participated in the converter box coupon rulemaking proceeding. The NTIA, the Department of Justice, and the Small Business Administration have participated in Commission proceedings whenever they have had an interest to do so. The Commission should have done the same. Instead of lending its expertise to the process, the Commission equivocated about its leadership role in the DTV transition which resulted in the failure to participate in NTIA's coupon converter box proceeding. The Commission's lack of engagement with NTIA, particularly during the converter box coupon program rulemaking, has truly complicated the DTV transition for television viewers and the entire broadcasting industry, especially the millions of households that rely on Class A, Low Power and analog translator stations.

Our painfully slow action on a comprehensive education effort is yet another illustration of the Commission's stubborn unwillingness to take proactive steps and to mitigate risks associated with the transition. As the Government Accountability Office (GAO) has found, "not having a comprehensive plan for the DTV transition limits the government's ability to measure efforts against planned goals, set milestones, and assess risks."<sup>2</sup>

For nearly two years, I have been calling on this Commission to, among other things, develop "a coordinated, comprehensive public/private campaign to educate the American people" about the benefits of digital broadcasting and the steps households need to take to continue receiving the over-the-air signals of full-power television stations.<sup>3</sup> I urged the Commission to take advantage of the time we had – *and have now lost* – to make the DTV transition a real national priority by developing an outreach and education plan that integrated the efforts of other federal agencies, state, local and tribal governments and permitted private industry

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<sup>2</sup> "Increased Federal Planning and Risk Management Could Further Facilitate the DTV Transition," U.S. Government Accountability Office, GAO-08-34 (November 2007) at p. 33.

<sup>3</sup> Keynote Address of Jonathan S. Adelstein, Commissioner, FCC, "I Want My DTV: Building a National DTV Consumer Education Campaign," at p. 2.

and consumer interest organizations to develop their complementary activities. This coordination was, and still is, needed because of the limited federal resources we have to target, reach, inform and assist consumers to make the transition successfully.

After nine months since Congress prodded us to pay more attention to DTV education,<sup>4</sup> today the Commission is finally establishing baseline consumer education standards for broadcasters, cable and direct broadcast satellite operators and other industry regulatees. This *Order* is an important step towards developing a coordinated DTV transition message and national education effort. For instance, we emphasize that consumers should specify that this is a transition for “full power” stations. The Commission’s own message on posters and some education materials still reads “analog broadcasting end February 17, 2009,” even though we know fully well that is not accurate. If we cannot get the technical details straight, how can we possibly expect millions of casual observers to do so?

While I approve many key features of this *Order*, I must dissent in part because we continue to demonstrate an unwillingness to marshal the expertise of Commission staff and the consultative services of public relations and marketing vendors to develop a report to the nation about the critical next and final steps necessary to ensure a smooth transition on February 17, 2009.

The DTV transition is indeed an enormous undertaking, and doomsday scenarios are counterproductive. But we should have a plan in place so industry, Congress and the American people know what steps are coming next. The half-hearted efforts of a reluctant regulatory agency have made the transition more difficult to administer. As GAO recognized last November, “[s]ince FCC has the broadest telecommunication responsibilities in the federal government, it is in the best position to increase assurances of a successful transition through increased attention to high-level comprehensive planning, performance measurement, and risk mitigation efforts.”<sup>5</sup> The Commission should begin to take a more proactive leadership role in the DTV education effort. With less than a year left in the transition for full power television stations, time is running out.

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<sup>4</sup> This is in sharp contrast to the Commission’s urgency to adopt the so-called “viewability,” dual carriage order on September 11, 2007. To the surprise of many observers, the Media Bureau circulated a draft order three business days after reply comments were due, and the Commission adopted final rules within three weeks.

<sup>5</sup> GAO-08-43 at 33.

**STATEMENT OF  
COMMISSIONER DEBORAH TAYLOR TATE**

*Re: DTV Consumer Education Initiative, MB Docket No. 07-148*

I believe this Commission should be focused on two major policy goals: broadband deployment to every corner of America, and a successful DTV transition. These goals underscore our commitment to keep America safe, informed, and connected. Today's Order provides an example of resolving national public policy challenges through marketplace solutions, and public-private partnerships with both the industry we oversee, as well as non-traditional partners. This type of cooperative enterprise will keep us on track for the greatest technological revolution since the advent of color television. The plan outlined in today's Order provides a reasoned approach, necessary tools, and certainty for American consumers in this historic process.

The DTV transition is a unique situation which demands the involvement and attention of the Commission, Congress, and other governmental agencies—federal, state, and local. With only a year to go until the transition, it is imperative that we continue to work together, as industry leaders, regulators, and government officials, to ensure a successful DTV transition. The DTV transition is a massive technological conversion that affects us all. I applaud those broadcasters who are working to ensure that every citizen receives critical news, information, and emergency alerts both before and after the transition, and I encourage others to do the same.

**STATEMENT OF  
COMMISSIONER ROBERT M. McDOWELL  
CONCURRING IN PART**

*Re: DTV Consumer Education Initiative, MB Docket No. 07-148*

The Commission's top priority this year is the success of the DTV transition. We have worked hard on rules to guide broadcasters through the technical work of the transition; and I applaud their investment in digital facilities and commitment to serving their communities. The next step is to ensure that every over-the-air viewer in every community in America receives the message about the tremendous advances in picture quality and sound that DTV will bring. Moreover, members of the public need to know the practical steps they must take to make the transition in their own homes work smoothly.

I am delighted that the private sector, working with its government partners, has developed a strong plan to educate the American people about the DTV transition. I enthusiastically support inclusion of this plan as part of our order. The order permits broadcast stations to choose among three options regarding consumer education obligations – one suggested by the broadcast industry, one originated at the Commission and the third by public television stations.

Broadcasters – who have the greatest incentive to ensure that they keep their viewers post-transition – have developed a comprehensive and multi-faceted plan to educate consumers about the transition. As proposed by the industry, broadcasters who commit to this plan will engage consumers through a combination of multilingual public service announcements (“PSAs”) throughout the day (including prime-time), 30-minute programs, stories on the local news, online resources, community events and speakers and outdoor advertising. The plan was developed by drawing on the extensive marketing experience of the broadcasting industry about how to most effectively reach and educate viewers. Each broadcaster has the flexibility to tailor the plan according to what its expertise suggests will work best in its community. Eighty-four percent of all stations – both commercial and noncommercial – have already committed to the industry plan and these efforts have commenced. I am pleased that the Commission has adopted this plan as part of today's order. Forging a public-private partnership with the industries most affected by the DTV transition will result in an effective consumer education campaign that serves the public interest.

For stations that do not commit to the industry plan, today's order mandates that each broadcast day be divided into four quarters and requires that stations air a certain number of PSAs and crawls during each of those day parts during certain periods before and after the February 17, 2009, transition date. The order also requires that the PSAs and crawls contain specific information and be of a certain

length. These requirements will ensure that stations that are not taking a multi-faceted approach at least use PSAs and crawls to inform viewers about the transition.

I am pleased that our order presents a feasible option for public television stations that recognizes the differences between commercial and noncommercial stations. Public television has developed a multi-faceted and targeted consumer education campaign of its own, dedicating airtime, grass-roots efforts and other resources worth over \$50 million. The order allows public television stations needed flexibility to comply with consumer education plans in ways that are relevant to their stations.

I applaud the consumer education efforts of several other industries as well. The Digital Television Transition Coalition -- formed in February 2007 by business, trade and industry groups in broadcasting, cable, satellite, consumer electronics, and retailers as well as grass-roots and membership organizations -- has commenced marketing and public education strategies to distribute consistent, accurate information about the transition to the public.

Separately, the cable industry launched an extensive campaign, which includes \$200 million in TV advertising, to educate viewers about the DTV transition. The campaign also includes community outreach through websites, brochures, local programming and other communications. We as viewers have begun to see the results of these efforts, with more to come. I hope that the requirements in the order that apply to MVPDs, consumer electronics companies and retailers give them sufficient flexibility with respect to delivering the appropriate message to their customers, while taking into consideration the government's interests in ensuring that viewers receive accurate and relevant information.

When the government mandates speech, as the Commission does today, we must adhere to the principles of the First Amendment and ensure that the requirements are narrowly tailored to advance our interests. Clearly, ensuring a smooth transition from analog to digital broadcasting is a substantial governmental interest. Our order today, however, gives stations a choice between a flexible and creative private sector solution or more regulation.

On the other hand, I note my concerns about the First Amendment implications of two parts of our order: first, requiring telephone companies that receive Universal Service funds to provide DTV transition information in the monthly bills of Lifeline/Link-up customers; and second, requiring winning bidders in the currently open 700 MHz spectrum auction to detail what, if any, consumer education efforts they are conducting. In both cases, the nexus between our governmental purpose and the means to achieve that purpose are quite remote. In

the case of telephone companies, it is unclear whether there is a correlation between Lifeline and Link-up customers and over-the-air viewers. Our order makes no such correlation. Yet, the order requires phone companies to provide a message, on government's behalf, that is unrelated to the services they provide. With respect to the winners of the 700 MHz auction, they will not provide service until after the digital transition ends, and when they do, the service may not be related to television. Given the infirmities in rationale for both of these requirements, I would have preferred not to adopt these mandates. Therefore, I must concur in these parts of the order.